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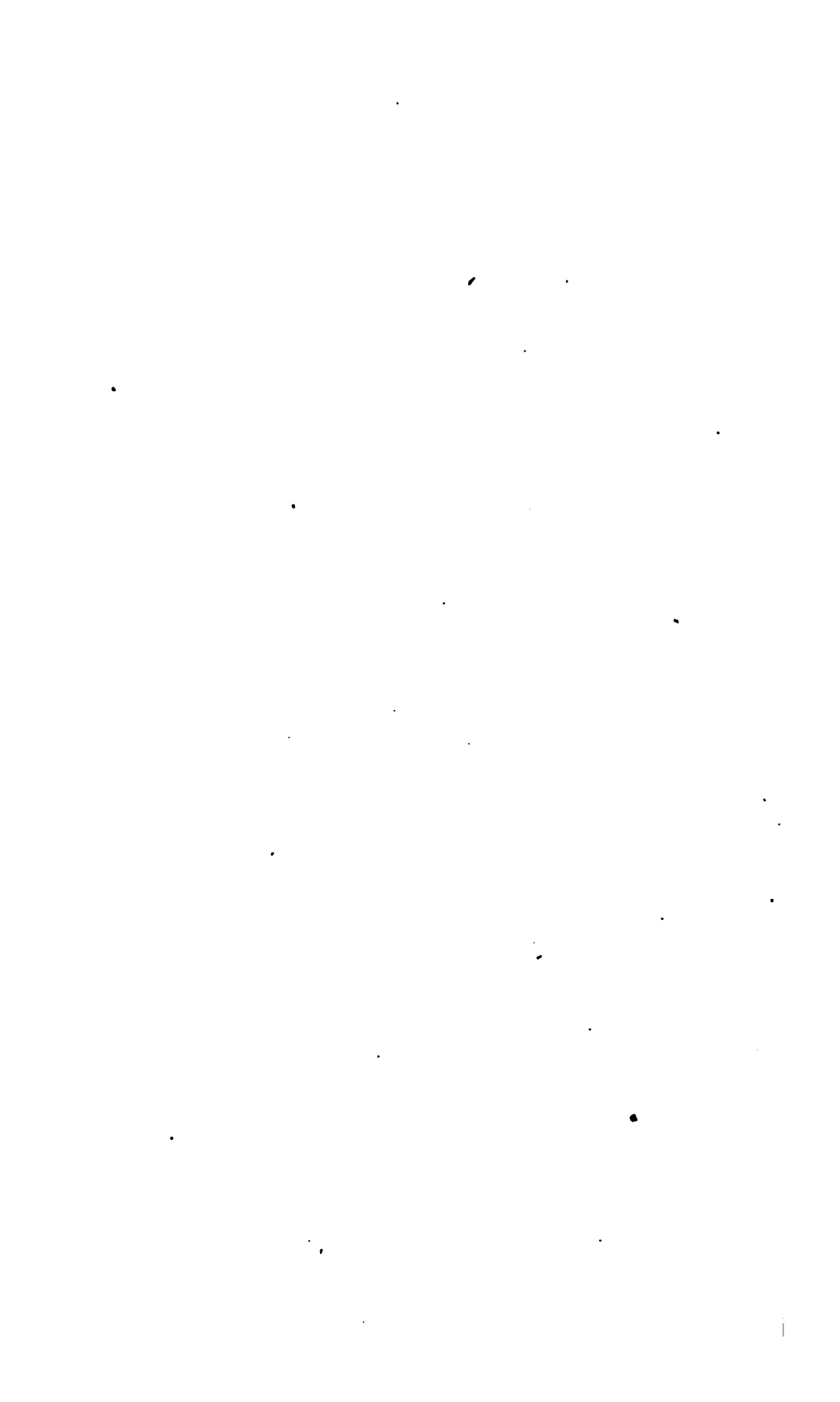
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THE
AMERICAN REPORTS
CONTAINING
ALL DECISIONS OF GENERAL INTEREST
DECIDED IN
THE COURTS OF LAST RESORT
OF THE
SEVERAL STATES
WITH
NOTES AND REFERENCES
BY
IRVING BROWNE.

Vol. XXXVIII.

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GEORGE W. STONE.

ARKANSAS.

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JOHN R. EAKIN.

CALIFORNIA.

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J. R. SHARPSTEIN.

GEORGIA.

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MARTIN J. CRAWFORD.
WILLIS A. HAWKINS. †

INDIANA.

WILLIAM E. NIBLACK, CHIEF JUSTICE. ‡
GEORGE V. HOWK, CHIEF JUSTICE. §
JAMES L. WORDEN,
BYRON K. ELLIOTT, |
WILLIAM A. WOODS. |

* Appointed vice Hiram Warner, resigned.

‡ At November term, 1880.

§ Term of office commenced Jan. 3, 1881.

† Appointed vice James Jackson, promoted.

§ At May term, 1881.

LIST OF JUDGES.

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 BENNET VAN SYCKEL,
 EDWARD W. SCUDDER,
 MANNING M. KNAPP,
 JONATHAN DIXON,

* From March 14, 1881.

† Resigned Feb. 19, 1881.

‡ Vice J. Z. George, resigned.

LIST OF JUDGES.

ALFRED REED,
WILLIAM J. MAGIE,
JOEL PARKER,
JOHN CLEMENT,
FRANCIS S. LATHROP,
AMZI DODD,
CALEB S. GREEN,
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JONATHAN S. WHITAKER.

NEW YORK.

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MICAHAH H. BONNER.

TEXAS COURT OF APPEALS.

JOHN P. WHITE, PRESIDING JUDGE.
C. M. WINKLER,
JAMES M. HURT,

VERMONT.

JOHN PIERPOINT, CHIEF JUSTICE.
JAMES BARRETT,
HOMER E. ROYCE,

* Resigned November 14, 1861.

† Appointed November 19, 1861, vice Charles J. Folger, resigned.

W

LIST OF JUDGES.

TIMOTHY P. REDFIELD,
JONATHAN ROSS,
H. HENRY POWERS,
WALTER C. DUNTON,
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CASES
IN THE
SUPREME COURT
OF
ALABAMA.

WHILDEN V. MERCHANTS AND PLANTERS' NATIONAL BANK.

(84 Ala. 1.)

Negotiable instrument — acceptance by telegram — evidence of telegram.

A telegram delivered by the transmitting company is admissible evidence where the original and the office from which it was sent are beyond the jurisdiction of the court. (*See note, p. 5.*)

A letter to a broker, inquiring the price of cotton, adding, "if we see a margin will authorize you to draw for the cost," and a subsequent telegram, on being informed of the price, "will advance cost if you buy strict good ordinary at sixteen," constitute "an unconditional promise in writing to accept a bill before it is drawn," and under a statute "amount to actual acceptance;" and presentment for acceptance or payment is not necessary.*

ACTION for breach of promise to pay bill of exchange. The opinion states the points. The plaintiff had judgment below.

Gunter & Blakely, for appellants.

Sayre & Graves and *D. Clopton*, contra.

* See *Franklin Bank of Baltimore v. Lynch* (32 Md. 370), 36 Am. Rep. 375, and note, 380.

Whilden v. Merchants and Planters' National Bank.

BRICKELL, C. J. [Omitting other matters.] It is insisted in support of the demurrer to the first, fifth, and sixth counts, that they seek to charge the defendants, either as acceptors of the bill drawn by Clisby, or upon a promise to accept it, made before it was drawn; and it is not averred the acceptance was in writing, or that the promise to accept was in writing, and unconditional. By the law-merchant, in the absence of a statute otherwise providing, an oral acceptance of a bill of exchange will bind the acceptor. A recent writer has thus expressed the result of the authorities: "According to the law-merchant, an acceptance may be (1) expressed in words; or (2) implied from the conduct of the drawee. (3) It may be verbal or written. (4) It may be in writing, on the bill itself, or on a separate paper; and a telegram has been held to be a sufficient acceptance. (5) It may be before the bill is drawn, or afterward." 1 Dan. Neg. Inst. 371. As to the effect of a mere verbal promise to accept a non-existing bill, communicated to, and upon the faith of which the holder was induced to take it, there is a contrariety of decision in the courts of this country. The conflict is rather as to the effect, than as to the validity of the promise. In *Kennedy v. Geddes*, 8 Port. 263, a general, indefinite, verbal promise to accept, made to the person taking a bill subsequently drawn, was held not to amount to, and incapable of being declared upon as, an actual acceptance of a particular bill. The case returned to this court, the declaration having been amended by adding a count upon the promise. The court recognized the distinction, stated in *Boycs v. Edwards*, 4 Pet. 122, "between an action on a bill, as an accepted bill, and one founded on a breach of promise to accept," etc. "The evidence necessary to support the one or the other is materially different. To maintain the former, the promise must be applied to the particular bill alleged in the declaration to have been accepted. In the latter, the evidence may be of a more general character, and the authority to draw may be collected from the circumstances, and extended to all bills coming fairly within the scope of the promise." The acceptor of a bill of exchange, as between the several parties to it, drawer, payee, indorser, and indorsee, *prima facie* is the party primarily liable. His engagement to accept is not a promise to answer for the debt, default, or miscarriage of another, but to assume only his own separate, independent liability, for which the drawer promises to answer, if he makes default, and notice of the default is given; and the indorser prom-

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ises to answer, if acceptor and maker are in default, and he has notice. *Kennedy v. Geddes*, 3 Ala. 581.

The statute has declared since, that an acceptance of a bill of exchange, unless it is to be implied from facts not entering into the present case must be in writing, signed by the acceptor, or his agent; and that an unconditional promise, in writing, to accept a bill, before it is drawn, amounts to an actual acceptance. Code of 1876, §§ 2101, 2102. These statutes may now render invalid all verbal acceptances of bills, and verbal promises to accept non-existing bills, except in favor of a party, who on the faith of such promise has negotiated a bill, and whose rights are saved, as they exist under the law-merchant, by a subsequent section of the Code. Code of 1876, § 2104. But as under the law-merchant a verbal acceptance, or verbal promise to accept a non-existing bill, was valid, the operation of the statutes is directed to the form of the contract. The rule of pleading, recognized by the authorities is, that where a verbal contract is valid in the absence of statutory inhibition, it is not necessary in declaring upon a contract of that kind, to aver whether it was written or unwritten. The statute intervening and pronouncing it invalid if not in writing, upon a proper issue being formed the plaintiff will fail, unless it is shown to have been written. 1 Chit. Pl. 244; *Chalie v. Belshaw*, 6 Bing. 529. The rule has been often recognized in this court, in reference to contracts within the statute of frauds. *Brown v. Adams*, 1 Stew. 51; *Rigby v. Norwood*, 34 Ala. 129. The form of complaint prescribed by the Code, for an action against the acceptor of a bill of exchange, contains a mere general averment that the bill was accepted, not stating that the acceptance was in writing, and is in tacit recognition of the rule.

An acceptance of a bill of exchange, if written upon it, becomes a part of the instrument itself, and is binding according to its legal terms and effect, in favor of all prior or subsequent parties; or if it be by a separate writing, or (under the law-merchant) if verbal, it has the same operation as if it were written formally on the face of the bill. 2 Am. Lead. Cas. 318. A collateral, a separate, independent promise to accept a non-existing bill, may not amount to an actual acceptance; but when it is communicated to a particular person, who, upon the faith of it, takes a bill to which it is applicable, and which is fairly within the scope of the promise, he is entitled to the benefits of such promise, and may in his own name

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maintain an action thereon; upon the same principle that whoever draws bills or makes advances, upon a general letter of credit, has a direct, immediate remedy in his own name, against the writer of the letter. *Boyce v. Edwards*, 4 Pet. 111; *Barney v. Newcomb*, 9 Cush. 46; *Pollock v. Helm*, 54 Miss. 1; s. c., 28 Am. Rep. 342; *Russell v. Wiggins*, 3 Story, 213; *Murdock v. Milk*, 11 Metc. 6; *Carnegie v. Morrison*, 2 id. 6; *Smith v. Ledyard*, 49 Ala. 279. It is not necessary to notice further the demurrers; for without departing from the principles settled in the authorities to which we have referred, they could not have been sustained.

We pass to such of the assignments of error relating to the admissibility of evidence, as are insisted upon in the argument of appellants' counsel. The first is in regard to the telegram purporting to be signed by the appellants, addressed to Clisby. The general principle is, as insisted on by appellants' counsel, that a party is bound to produce the best evidence within his power, of which a fact is capable; and that whenever the original of a writing can be produced, secondary evidence of its contents will not be received; and is as applicable to telegrams as to other writings. 1 Whart. Ev. 576. There is some difficulty in determining whether the message delivered to a telegraphic office, or that which is delivered to the person to whom it may be addressed at the point of destination, is to be regarded as the original. Perhaps under some circumstances, the one or the other may be considered the original. It is not now necessary to enter on that inquiry. If the message as it was delivered to, and may be preserved in the office of the telegraph company at Philadelphia, is to be regarded as the original, it was without the jurisdiction of the court, as was its custodian. It is a settled rule of evidence in this country, that if writings, necessary as evidence in a court of one State, are in the custody of persons residing in another, secondary evidence of their contents will be received. *Burton v. Driggs*, 20 Wall. 134; *Beattie v. Hilliard*, 55 N. H. 428; *Binney v. Russell*, 109 Mass. 55; *Shorter v. Sheppard*, 33 Ala. 648; 1 Whart. Ev., § 130. Not only was the original—taking the view of appellants' counsel as to which paper was to be regarded as the original—without the State, but the appellants had voluntarily admitted to Peck the genuineness of the dispatch offered in evidence, and the admission entitled it to be received. 2 Whart. Ev., §§ 1091-3.

[Omitting a minor matter.]

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The promises are in writing; first in the letter, that if the appellants, on being informed of the price of cotton, saw a margin, they would authorize Clisby to draw for the cost. Then, after being informed of the prices, the promise by telegram is to advance the cost. The language of the letter and telegram will not admit of any other just interpretation, than as conferring authority upon Clisby to draw on the appellants for the money to purchase cotton of the quality and at the prices specified. *Bank of Michigan v. Ely*, 17 Wend. 508; *Ulster County Bank v. McFarlan*, 5 Hill, 432; *Johnson v. Clark*, 39 N. Y. 216. It would be thus read and understood by the commercial world, who were invited and expected to deal with Clisby upon the faith of it. The terms of the writing are absolute, not conditional. Cotton of a particular quality is to be purchased, at a particular price. This is however a matter which is referred to the judgment and determination of Clisby, and not to the judgment and determination of those dealing with him. If upon them was cast the duty of supervising his conduct in this respect—if they could not rely on his representations—the authority would not avail for the purpose for which it was given. There would be but few, if any, who would act upon it, if it was at the peril of being responsible for his judgment and determination in reference to the quality and price of cotton. If he has abused the discretion committed to him by the appellants, they must look to him for indemnity. Their obligation to the appellee can not be avoided, unless notice of his indiscretion was imputable, of which there is no pretense. *Bank of Michigan v. Ely*, *supra*. Standing in the relation of acceptors, the appellants were the principal debtors; and no presentment for payment, or for acceptance, was necessary to fix their liability.

[Minor matters omitted.]

Judgment affirmed.

NOTE BY THE REPORTER.—In *Smith v. Easton*, 54 Md. 188, it is held that a telegraphic dispatch is not admissible in evidence without proof of the handwriting of the original and of its delivery for transmission. This was an action to enforce an agreement by telegraph to indorse. The court said: "The message, if any, sent by James T. Easton, to that office, to be transmitted to Chesapeake City, was the original (Scott & Jarnagin, Law of Tel., § 337, and authorities there cited), and not the message which was received over the wires at Chesapeake City. The latter must be considered as a copy (id., § 361), and carries with it none of the qualities of primary evidence. Ordinarily the usual course is to show the delivery of the original message of the party, sought to be charged, at the office from which it is to be telegraphed, and then show that it was transmitted and delivered at the place of its destination. But even where the original is produced its authenticity must be established, and this either by proof of the handwriting, or by other

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proof establishing its genuineness. The destruction of all the messages sent from the office, on the day named, is sufficient foundation for the admissibility of secondary evidence. But this secondary evidence can only be admitted upon proof that the copy offered is a correct transcript of a message actually authorized by the party sought to be affected by its contents." This is sustained by *Howley v. Whipple*, 48 N. H. 487, and *U. S. v. Babcock*, 3 Dill. 578. Mr. Abbott (Trial Ev., 290), assents to this where the object is to prove assent or admission, but says the copy delivered is the primary evidence to prove notice to the receiver. *Wheat v. Cross*, 31 Md. 99; s. c., 1 Am. Rep. 28. In *Barons v. Brown*, 25 Kans. 410, it is held, that where the controversy is not between the sender and the person to whom a telegram is addressed, the original message, if not lost or destroyed, must be produced.

BARSDALE V. GARRETT.

(64 Ala. 277.)

Dower — action when barred by laches.

Although there is no statutory period within which a widow must assert her dower right in lands not aliened by her husband, yet a delay of twenty years will defeat her claim in equity.

BILL for dower. The opinion states the case. The bill was dismissed below.

Cook & Enochs, and *W. R. Houghton*, for appellants.

Clopton, Herbert & Chambers, contra.

BRICKELL, C. J. The lands in which dower is claimed are not, by any averment of the bill, shown to have been the last dwelling-house of the husband, or the plantation connected therewith, possession of which the widow was entitled to retain until her dower was assigned; nor does it appear that any time subsequent to the death of the husband the widow ever had possession of them. The right to dower was consummated by the death of the husband; yet it did not confer a right of entry, nor the right to take the rents and profits, nor any right of ownership. *Weaver v. Crenshaw*, 6 Ala. 873. Her right lay in action, and it was to compel the assignment to her of a third part of the lands in severalty. *Scribner on Dower*, 26.

It was early settled in England, and the doctrine was adopted in many of the States, that the widow's remedy for the assignment of dower was not within the operation of the Statute of Limitations.

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Ridgeway v. McAlpine, 31 Ala. 458. The reason is thus stated by RICHARDSON, C. J., in *Barnard v. Edwards*, 4 N. H. 109: "The statute applies only to actions, entries and claims, founded on some previous seizin or possession of the lands, tenements, or hereditaments demanded, from which seizin or possession the time of limitation may be dated, and dower is not within the statute. For we have decided, that dower cannot have a limitation dated from the seizin of the husband. *Moore v. Frost*, 3 N. H. 126. And it is clear that a limitation of dower cannot be dated from the seizin or possession of the demandant, because she cannot have either until dower has been assigned her." When the claim or rights of an alienee of the husband are involved, or of any one claiming under such alienee, the statute now requires, that proceedings for the assignment of dower shall be commenced within three years after the death of the husband. Code of 1876, § 2251. This is the only statute we have, which creates a bar from the lapse of time to the assignment of dower; and it must be observed that it only applies when there was an alienation by the husband, and is incapable of extension to a case like the present, where the alienation was after the death of the husband, by his personal representative, under a decree of the Court of Probate.

While the Statute of Limitations may not operate, *proprio vigore*, as a bar to the assignment of dower, the right and claim may, in the judgment of a court of equity, from the lapse of time become stale, and acting upon its own peculiar principles, the court, upon considerations of public policy and general convenience, may refuse to intervene for the relief of a dowress, who has slept upon her rights. "Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence." *Smith v. Clay*, 3 Bro. C. C. 639, note. When twenty years are suffered to elapse from the consummation of the right of dower, in the absence of evidence which shows a recognition of the right by the parties whose estate is affected by it, without the assertion of the right by one of the appropriate remedies provided by law, a conclusive presumption of its extinguishment arises, not only in courts of equity, but in courts of law. *Ridgeway v. McAlpine*, 31 Ala. 458; *Owen v. Campbell*, 32 id. 521; *Harrison v. Heflin*, 54 id. 552; *McArthur v. Carrie*, 32 id. 75; *McCartney v. Bone*, 40 id. 533. No such recognition is averred in the present bill, and the only excuses for the long delay in the assertion of the right, and acquiescence in a possession hos-

tile to it, when analyzed, resolve themselves into a mere want of diligence on the part of the demandant. A proceeding instituted within proper time, in a court of competent jurisdiction, was neglected and abandoned ; and more than ten years thereafter, when purchasers from the personal representative had passed into quiet possession, reposing on a title derived from a court of competent jurisdiction, she is quickened into the assertion of her rights. Under our decisions, supported, as we believe, by the highest considerations of public policy, twenty years' acquiescence in the assertion of the adverse rights, ripens into a positive bar. Of it the diligent can have no cause of complaint, and the negligent are silenced.

We find no error in the decree of the chancellor, and it must be affirmed.

Decree affirmed.

STRAUSS V. MEERTIEF.

(34 Ala. 200.)

Master and servant — breach of contract for employment — duty to accept employment by others — cause assigned for dismissal.

In actions by a father for wages on a contract for employment of his minor son for a certain term, the son having been prematurely dismissed, the father may recover for every installment as it falls due ; and he is not bound to accept employment for his son by others, unless in the same or a similar employment, in the same place, and by persons of unobjectionable capacity reputation, habits, morals, and mode of conducting ; and the burden of showing such an opportunity is on the defendant.

The employer is not estopped by the cause which he assigns for dismissal of his servant.

ACTIONS for wages. The opinion states the cases.

Joseph S. Winter, for plaintiff.

Gunter & Blakely, contra.

BRICKELL, C. J. These causes between the same parties, founded on an averment of separate breaches of the same contract, were

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argued and submitted together. The case of the plaintiff, as he gave evidence tending to support, and as is alleged in his complaints, is, that on 2d day of November, 1877, the defendant, Meertief, contracted with him for the services as a clerk of his minor son, Isaac Strauss, for a term of twelve months, then commencing, at and for the sum of three hundred dollars, payable in monthly installments of twenty-five dollars. The first case was an action for the recovery of the wages claimed to be due for the month of June, 1878; the second, for the installment of wages claimed to be due for the month of August, 1878. It is averred that in May, 1878, the defendant, without cause, discharged said Isaac from his service, and refused to permit him to perform said contract.

On the trial of the first cause, the defendant offered evidence tending to show, that after the discharge of said Isaac, he had opportunity of employment, and that such offer of service was declined. To the introduction of this evidence, the plaintiff objected; but his objection was overruled, and the defendant was permitted to prove, that some time in May, 1878, there was an offer made by one Brock, to plaintiff and his son, to employ the son for a year, at the rate of three hundred dollars; and another offer, during a bankrupt's sale, to employ him at the rate of fifty-four dollars per month.

It is not matter of doubt, that when a contract is made for personal services, for a particular term, at stipulated wages, if the party employed is, without cause, discharged during the term, he has the right to regard the contract as broken, and may immediately sue and recover all the damages resulting from its breach, which he may sustain up to the time of the trial. But he is not compelled to accept the breach of his employer as a termination of the contract; he may elect to treat it as continuing, and keeping himself in readiness to perform the contract on his part, may recover the wages due on the expiration of the term. *Davis v. Ayres*, 9 Ala. 202; *Ramey v. Holcomb*, 21 id. 567; *Fowler v. Armour*, 24 id. 194. And if the wages are payable by installments, he may sue for and recover each installment as it becomes due. *Davis v. Preston*, 6 Ala. 83.

2. In this class of cases the general principle applies, that whoever seeks redress for an injury from the conduct of another, is under a moral and legal duty to use due diligence in preventing loss thereby. Sedg. on Dam. 105. It is only direct damages re-

sulting from the breach of the contract which are recoverable. These are a full compensation for the wrong. A party having it in his power, by ordinary care and diligence, to take measures by which the loss will be less aggravated, cannot content himself with inaction. The wrong does not absolve him from all duty to him from whom it may proceed. The logic, justice and equity of the principle are strongly stated and illustrated in *Miller v. Mariner's Church*, 7 Me. 55, by WESTON, J.: "If the party injured has it in his power to take measures by which his loss may be less aggravated, this will be expected of him. Thus in a contract of assurance, where the assured may be entitled to recover for a total loss, he, or the master employed by him, becomes the agent of the assurer, to save and to turn to the best account such of the property assured as can be preserved. The purchaser of perishable goods at auction fails to complete his contract; what shall be done? Shall the auctioneer leave the goods to perish, and throw the entire loss upon the purchaser? That would be to aggravate it unreasonably and unnecessarily. It is his duty to sell them a second time; and if they bring less, he may recover the difference, with commissions and other expenses of resale, from the first purchaser. If the party entitled to the benefit of a contract, can protect himself from a loss arising from a breach, at a trifling expense, or with reasonable exertions, he fails in social duty if he omits to do so, regardless of the increased amount of damages for which he may intend to hold the other contracting party liable. *Qui non prohibet, cum prohibere posset, jubet*. And he who has it in his power to prevent an injury to his neighbor, and does not exercise it, is often, in a moral, if not in a legal point of view, accountable for it. The law will not permit him to throw a loss, resulting from a damage to himself, upon another, arising from causes for which the latter may be responsible, which the party sustaining the damage might, by common prudence, have prevented."

In our own case of *Murrell v. Whiting*, 32 Ala. 66, this principle — that a party entitled to, and claiming the benefits of a contract, is bound, if he can with reasonable exertions, to protect himself from the loss proceeding from its breach — is fully recognized. The reason and justice of the principle must find repeated illustrations in the business of life. Take this case. The son was employed as a clerk for the term of one year. Before the expiration of the term he is, as alleged, discharged without cause. If he had been

permitted to continue the service he could have earned, and the plaintiff would have been entitled to the stipulated wages; no more and no less. Discharged, the only loss for which, in this action founded on the contract, compensation can be claimed, is the wages which would have been earned. But the next day, or at any other intermediate period, like employment at the same or greater wages, by a party as to whom there is no just exception, is offered him; or he can obtain it, by the exertions made ordinarily by men out of employment. What damages has he sustained, except the loss of wages when the act of the defendant left him necessarily unemployed? He may not continue unemployed from choice, merely to recover from the defendant the wages he had contracted to pay. Neither good morals nor the law will countenance him in persisting voluntarily in idleness, that the amount of his recovery from the defendant may not be diminished. When compensation was given him, for the time he was necessarily employed, all the demands of justice are satisfied. *Shannon v. Comstock*, 21 Wend. 457; *Costigan v. Mohawk & Hudson R. R. Co.*, 2 Denio, 609; *Jones v. Jones*, 2 Swan. 605; *State v. Powell*, 44 Mo. 436.

3. We must not be understood as intimating, that he is under the duty of engaging in, or accepting, any other employment than such as may be of the same nature and description of that in which he was employed by the defendant; or employment of that kind, at a place different from that in which the employment of the defendant contemplated his remaining during the term. The father, hiring his minor son as a clerk to a merchant, may justly be presumed to have in view the acquirement by the son of knowledge and skill in that particular business. This will often be a more material consideration than the wages the son can earn during minority. That for the son there was offered, or could with reasonable exertions have been obtained employment, as a laborer on a farm, or as the employee of a railroad company, or a workman in a machine-shop, or as an operative in a factory, or in any service not of the same kind, and not affording to the son like advantages for the acquirement of knowledge and skill as a merchant, cannot and ought not to furnish a ground for the diminution of the plaintiff's recovery. There is much of personal trust and confidence reposed by a father in engaging his son in the service of another. It must be, if sheer indifference to the welfare of the son is not imputed, a material ingredient of all such contracts. Because of the personal trust, which

enters into a contract of apprenticeship, the law holds it is not assignable by the master. *Tucker v. Magee*, 18 Ala. 99. Any reasonable objection, because of capacity, reputation, mode of dealing and transacting business, or of habits or morals, which could be made to the person from whom employment could be obtained, would afford a justification to the plaintiff for rejecting it when offered, or excuse him from not making exertion to secure it. There can be, only with "a trembling hand," an interference with, or control taken of the discretion of a father, in the determination of that which is the best for his child.

4. If the evidence offered had been, as first proposed, merely that the son had opportunity of service, which he declined, it ought not to have been received. It is the defendant claiming that the plaintiff cannot recover, or that the measure of his recovery shall be reduced, because of facts occurring after a confessed breach of contract. The burden of establishing such facts rests upon him, as of any other fact which is in confession and avoidance. The evidence first offered, to which objection was made, on its face was irrelevant. It was not, so far as disclosed, of a service the father could be held bound to accept. It may be it was the offer of a service so foreign to that in which the defendant had engaged to employ the son, that from its very nature the father could have refused it. Nor was the offer of employment made to the father, but to the son, who, without the consent of the father, had not capacity to accept or reject it. But though the proposition may have been of evidence which was irrelevant, yet if the evidence given was relevant and admissible, the error of the court would be error without injury. The evidence introduced was of an offer of employment which the father rejected, assigning no other reason for the rejection, than that it might interfere with his claim against and right of recovery from the defendant. The evidence was admissible; and if there was any other reason for not accepting the offer of employment than that assigned when it was refused, it could have been shown by the plaintiff. It results from the views we have expressed, that in the first case the Circuit Court erred in refusing the first charge requested by the plaintiff, but that there was no error in refusing the second and third charges; and in the second cause, that the court did not err in giving the charges requested by the plaintiff, to which exceptions were reserved.

5. The cross-examination of a witness is of necessity, largely

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under the control, and within the discretion of the primary court; and appellate courts are reluctant to review and reverse their action, in limiting or enlargement its area, when the purpose is to show the bias, or motive, or to impeach the witness. Much must depend on the conduct and attitude of the witness during the examination; and much may depend on the course of the cross-examining counsel. We are disinclined to review and reverse the action of the Circuit Court in its rulings in reference to the questions propounded on cross-examination to the plaintiff, and to his son; as we would be if the question had been allowed. 1 Whart. Ev., § 528.

There was no necessity that the defendant, at the time of discharging the son from employment, should have assigned any special reason for the dismissal. If such reason then existed, and was known to the defendant, it justified the dismissal, though it may not have been then assigned. The fact that he assigned, as the cause of dismissal, only the want of business, will have more or less tendency to show that there was no other cause for it, and will cast more or less doubt upon the evidence that there was a justifying cause, growing out of the conduct of the son. These are matters for the consideration and determination of the jury; and the assertion by the defendant of a particular cause for it, at the time of the dismissal, does not estop him from showing misconduct on the part of the son; which would justify it.

[Omitting minor matters.]

The result is, the judgment in the first case must be reversed, and the cause remanded; and the judgment in the second case must be affirmed.

Judgment accordingly.

GOODMAN V. WINTER.

(64 Ala. 410.)

Jurisdiction — infants' real estate — power of court to sell.

The Court of Chancery has inherent power to decree a sale of an infant's real estate.*

ACTION to recover real estate. The opinion states the point.

* To same effect, *Dodge v. Cole* (97 Ill. 338), 37 Am. Rep. 111.

R. M. Williamson, for plaintiffs.

Winter & Winter, for defendant.

BRICKELL, C. J. [Omitting other matters.] It is insisted that a court of equity, being without jurisdiction to decree a sale of the lands of an infant, is without jurisdiction to ratify or confirm an unauthorized sale of his lands by a guardian or a trustee, or by a stranger intruding himself into the relation of either; and that no estoppel can be raised against them. Whatever may be the doctrine prevailing in the Court of Chancery in England, or whatever contrariety of opinion, or of doubt, may prevail in the different States as to the jurisdiction of a court of equity to decree a sale of the real estate of an infant, in this State the jurisdiction must be regarded as existing. *Ex parte Jewett*, 16 Ala. 410; *Rivers v. Durr*, 46 id. 418. The jurisdiction does not spring from, nor is it dependent upon, the character of the estate—whether absolute or contingent; whether in possession, or the possession postponed until the happening of a future event. It rests upon the power and duty of the court to protect infants—to take care of, and preserve their estates while under disability debarring them from the administration of property. The courts would be more reluctant to decree the sale of an estate in remainder, or of a contingent estate, lest it might operate a sacrifice of the interests of the infant; but the jurisdiction exists, though it may be more seldom and more sparingly exercised. It may be the infant has no other source from which maintenance and education can be derived. Or, it may be the estate is deteriorating in value, without fault or neglect on the part of the tenant of the particular or prior estate, and that the deterioration will continue, so that when the preceding estate expires, it will be, if not valueless, of greatly less value than when the court is requested to order a sale. A sale is then necessary for the maintenance and education, or to conserve the interests of the infant, and it has been the practice of Courts of Chancery in this State to decree it.

The case of *Crawford v. Cresswell*, 55 Ala. 497, does not, as is insisted by counsel for the appellant, cast any doubt on the existence of the jurisdiction. The case was before the court on appeal from the decree of the chancellor, ordering a different investment of trust funds from that which the will directed. The decree was

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not collaterally drawn in question. Whether the chancellor's decree would, in any event, be sustained on appeal, was not decided; but it was held, the power ought not to be exercised (and in that case was improperly exercised), unless it was shown by clear, precise averment of facts, supported by convincing evidence, that a necessity existed for a conversion of the funds, and that the conversion would not prejudice the remaindermen.

The reasons controlling the English Court of Chancery for repudiating jurisdiction to decree a sale of an infant's real estate, seem to have been on the death of the infant, the course of descent might have been interrupted; and if converted into personal property, he could, during minority, bequeath it. The first reason could never have been of force in this State, as the same persons who would take real estate by descent, as heirs, would take personal property, as next of kin under the statute of distribution. Each reason subordinates the necessity and interest of the infant while living to that of those who would succeed to the estate on his death; while with us, the court looks only to the care, protection, and advantage of the infant. 2 Perry on Trusts, § 605. In England, real estate may be of fixed and certain value, and the better investment for infants or other persons resting under disability. The courts here are admonished that real estate is fluctuating in value, and often in some kinds of personal property investments are of more certain value, yielding a larger and more reliable income. There seems no substantial reason for distinguishing here between the power of the court to decree a sale of real and of personal property; and in practice none has been recognized.

[Other questions omitted.]

STEELE V. STEELE'S ADMINISTRATOR.

(64 Ala. 438.)

Administrator — judgment against — effect of as to lands — limitation.

An administrator has no power to renew a debt of the decedent, barred by the Statute of Limitations, so as to make it effectual as to the decedent's lands; and the heirs may plead the Statute of Limitations as against a judgment recovered on such renewed debt against the administrator.

BILL to marshal assets. The opinion and head note show the point.

Robinson & Walker, D. P. Lewis, and D. Clopton, for widow and children.

Cabaniss & Ward, Brandon & Jones, L. P. Walker, Watts & Sons, for others.

STONE, J. [Omitting other questions.] 6. The title to the personal assets of a decedent vests in the personal representative, the very moment he is appointed and qualifies. He is the owner of them; but not in his own right. He holds them in trust, first to pay debts and lawful charges; then, to be divided, or disposed of, as the will, or law of distributions, declares. To these ends, he not only holds the title, but he exercises a general power over them, limited only by certain declared rules of law. *Woolfork v. Sullivan*, 23 Ala. 548; 1 Brick. Dig. 932, §§ 261 *et seq.*; *Baldwin v. Hatchett*, 56 Ala. 461; *Hutchinson v. Owen*, 59 id. 326. If the personal assets are applied to the payment of debts, it matters not if the collection of those debts could have been defeated by a plea of the Statute of Limitations. The personal representative is not compellable to plead it; and he is guilty of no *devastavit* in failing to make that defense, unless he be guilty of negligence, act in bad faith, or in collusion, when there is doubt of the justness of the claim. It would give rise to grave suspicion, if having cause to distrust the justice of the claim, he failed to interpose such defense to a claim that was barred by lapse of time. *Teague v. Corbitt*, 57 Ala. 529.

But real estate, though made subject to debts by our statutes, in the absence of testamentary direction, stands on a very different footing. The title is never in abeyance, but on the death of the ancestor descends instantly to the heir or devisee. True, the personal representative may demand and hold possession, and exercise the statutory power of renting, and even selling it for the payment of debts. But it is a mere power—a bare authority—and must be executed as the statute directs. *Chighizola v. Le Baron*, 21 Ala. 406; *Martin v. Williams*, 18 id. 190. Until exercised, or steps taken looking to its exercise, the right of the heir is not interrupted. *Masterson v. Girard*, 10 Ala. 60; *Br. Bank v. Fry*, 23

id. 770 ; *Leavens v. Butler*, 8 Port. 380 ; *Anderson v. McGowan*, 42 Ala. 280 ; 1 Brick. Dig. 939, § 351. From these premises it results, that the personal representative can do nothing, save as the statutes give him authority, to divest or incumber, the title to the realty, which descends to the heir, or devisee. The statutes have given him no power to do so. Until he takes possession, sells under a power conferred by the will, or begins the exercise of some one of the statutory powers, under which he may obtain an order of sale, he has done nothing to which the heir or devisee is a party, or by which they can be concluded. He may revive a debt by partial payment or promise ; he may submit to a recovery of judgment. These are not the acts of the heir, for in these respects he is not their representative. They do not derive their title through him. All he may do or suffer, as affecting their landed estates, is *res inter alios acta* ; and when an effort is made by the personal representative, or another, to intercept the descent, and appropriate the lands to the payment of the alleged debts of the ancestor, the heirs or devisees for the first time become parties to the record ; and they then come into court with all their rights of defense unimpaired. They bring with them the same rights to plead, call for proof, and make defense, as if no litigation had preceded. *McGuire v. Shelby*, 20 Ala. 456 ; *Gwynn v. Hamilton*, 29 id. 233.

In *Bond's Heirs v. Smith*, 2 Ala. 660, this court said : " It is very clear that the legislature did not contemplate a sale of the lands, as a matter of course, on the application of the executor or administrator, but required him to establish the allegations of his petition by proof, if denied by the heir ; and where the heirs are infants, no admission can be made to dispense with this proof. What then is the allegation to be proved ? It is, that the personal estate is not sufficient to pay the just debts of the testator or intestate. To ascertain this, it is obviously necessary to inquire what debts are binding on the testator or intestate, and consequently a charge on the estate ; and it seems to us that any defense, which the ancestor could have made, if the suit had been brought against him, may be made by the heir. The proceeding is, in effect, a suit by the creditors against the heirs, claiming satisfaction out of the estate which has descended to them, for a debt due from the ancestor. It does not therefore rest with the administrator to say whether the bar of the Statute of Limitations shall be interposed or not ; he is placed

in an antagonist position to the heir, and cannot therefore make any admission which shall prejudice him. His power to meddle with the real estate is derived entirely from the statute; it is a special authority, derived from the order of the court, on proof of the allegations of the petition, and confers no power further than is necessary to execute the trust, with which he is clothed for the benefit of the creditors. It is true, that while acting in his appropriate sphere, as the representative of the deceased, he may decline to interpose the bar of the statute to defeat a just claim; but when he lays down his character of representative of the deceased, and becomes a party litigant on behalf of the creditors, against the heirs, it would be a strange anomaly if he should be allowed to dictate the defense."

In *Teague v. Corbett*, *supra*, the administrator had suffered judgment to go against him, on a note, which he could have prevented by a plea of the Statute of Limitations. He paid the judgment, in part with moneys derived from a sale of intestate's lands, made under an order of court for the payment of debts. The question was, whether he should be allowed such payment as a credit on his final settlement. This court said: "It is apparent the administrator cannot be reimbursed the payment made on this judgment, unless he is allowed to retain from the assets in his hands arising from the sale of the lands of the intestate, made under decree of the Court of Probate. The moneys for which the lands were sold, as to the heirs, and as to all questions of charge or liability, or of descent or succession, must be regarded as a substitute for the lands. *Williamson v. Mason*, 23 Ala. 488; *Chaney v. Chaney*, 38 id. 35. Between an administrator or executor, and the heir or devisee, no relation of privity exists; and the real assets cannot be bound by any admission or acknowledgment made by the personal representative. Hence, though the executor or administrator is not bound to plead the Statute of Limitations, and by omitting to plead it, or by an express promise in writing, may revive a demand the statute bars, and thereby charge the personal assets, no such charge can be created on the real assets. He is the owner of the personal assets as trustee, but the lands descend, if not devised, to the heir; or if devised, pass *eo instanti* the death of the testator, to the devisee; and as to the heirs or devisee, his admissions or acknowledgments are *res inter alios*."

In *Rogers v. Grannis*, 20 Ala. 247, it was decided, that a judg-

ment, rendered against an administrator in chief, did not establish the existence of the debt against the estate in the hands of the administrator *de bonis non*. In Freeman on Judgments, § 163, it is said : " Between the real and personal representatives of a deceased person there is no privity. Hence, a judgment against an administrator or executor is never conclusive against the heirs or devisees, and a judgment for or against an heir or devisee has no effect upon an administrator or executor. A decree against an executor is not binding on the heir, because he is not a party to the suit, can not offer testimony, adduce evidence in opposition to the claim, nor appeal from the judgment. But as the heirs are not bound by a judgment against the administrator, they are at liberty to dispute any claim so allowed, because the allowance has no higher effect than a judgment. If the allowed claims are made the basis on which to obtain an order to sell the real estate, the heirs are not precluded from contesting them as freely as though they had acquired none of the properties of a judgment ; for as to the heirs, they are not *res judicata*."

In *Mooers v. White*, 6 Johns. Ch. 360, 387, Chancellor KENT, after an elaborate review of authorities, used the following language : " If however we were to admit that the defendant, W. was still in time to apply for the sale of the real estate ; yet I apprehend, that when the persons interested in the real estate appear before the judge, or surrogate, with their allegations and proofs, they are entitled to raise the same objections to the creditor's demand, which they might have raised, if they had been regularly sued ; and that they may, of course, interpose the Statute of Limitations. The justice and reasonableness of the proposition are so exceedingly clear, that I can not regard it as susceptible of doubt. The surrogate must be satisfied of the existence of the debts beyond the amount of the personal estate, before he can grant the order for the sale of the real estate. He must adjudge what are debts, and the statute must mean subsisting debts. If they are barred by the statute, and that be set up as a defence, the conclusion is that they have been paid, and that they do not then subsist. If the heir or purchaser appears, and makes this defense, it is his defense ; and the executor has no right to interfere, and disturb or waive it." The following authorities are to the same effect : *Baker v. Kingsland*, 10 Pai. 366 ; *Vernon v. Valk*, 2 Hill. Ch. 257 ; *Riser v. Snoddy*, 7 Ind. 442 ; *Mason v. Peter*, 1 Munf. 437 ; *Gilmore v. Tisdale*, 1 Yerg.

285; *Stone v. Wood*, 16 Ill. 177; Rorer Jud. Sales, § 234; *Jennings v. Key*, 5 Ind. 257; *Rogers v. Rogers*, 3 Wend. 503; 20 Am. Dec. 716; *Gwynn v. Hamilton*, 29 Ala. 233.

We have thus shown that neither a promise nor admission by the personal representative, nor a judgment suffered by him, fixes a lien or liability on the real estate, as against the heir or devisee. As stated by Judge ORMOND, in *Smith v. Bond*, *supra*, in proceedings to sell lands for the payment of debts, the personal representative represents and is the agent of the creditors. He proceeds in their right, and antagonizes the claim and right of the heir or devisee. If it be contended that the will, in this case, in express terms permitted the estate to be kept together until the debts were paid, and thus prevented the running of the statute, so long as the executor kept the estate together, and kept the debts alive by renewals; the case of *Carrington v. Manning*, 13 Ala. 611, is a full answer to this position. The will in that case directed that certain lots be "sold, and the proceeds applied to the payment of legacies hereafter bequeathed, and the discharge of my (testator's) debts. I hereby direct and require my executors, hereinafter named, to keep my estate in the county of Marengo, Alabama, together, until all my debts and legacies are paid off and discharged," etc. Testator further expressed his intention that his estate in Marengo should not be divided until all his debts and the legacies were satisfied. It was held that the will did not create a trust by implication in favor of creditors, which would take a debt due by the deceased out of the statute of limitations, or prevent it from running, or prevent the bar of the statute of non-claim. See also *Perry on Trusts*, § 559.

We have been referred to *Peter v. Beverly*, 10 Pet. 532, as showing that the renewals made by M. W. Steele, the executor, continued the debt as a charge against the estate and its realty. That case stands directly opposed to the decision of this court in *Brown v. Lang*, 4 Ala. 50. This court held the act of renewal to be a novation, and an extinguishment of the claim as a debt of the estate, by the creation of a new personal debt of the administratrix. The Supreme Court of the United States held a similar act to be but an extension of a subsisting debt against the estate. Moreover, in the case of *Peter v. Beverly*, the report fails to show there was any plea of the Statute of Limitations. If, as the argument of counsel tends to show, length of time was relied on as a bar to

Steele v. Steele's Administrator.

recovery, the court did not consider it. We prefer to rest our decision of this question on the principle stated above, rather than on the case of *Peter v. Beverly*, which is silent on the question of the Statute of Limitations.

[Omitting other points.]

Reversed and remanded.

BRICKELL, C. J., not sitting.

CASES
IN THE
SUPREME COURT
OF
ARKANSAS.

WOODS V. STATE.

(35 Ark. 36.)

Statute — construction — druggist selling ardent spirits without license on prescription.

Under a statute forbidding the sale of ardent spirits by any person for any purpose without a license, a druggist cannot lawfully sell such spirits, even as medicine upon the prescription of a physician.*

CONVICTION of selling ardent spirits without a license. The opinion states the case.

M. H. Sandells, for appellant.

Henderson, attorney-general, *contra*.

HARRISON, J. N. D. Woods was convicted upon an indictment for selling whisky without license, and fined \$200. He moved for a new trial, upon the ground that the conviction was not warranted by the evidence, and his motion being overruled, he accepted and appealed.

* To same effect, *Wright v. State*, 101 Ill. 126; compare *Ausley v. State*, *post*; *Intoxicating Liquor Cases* (35 Kans. 761), 37 Am. Rep. 284.

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The case was tried by consent by the court, upon the following agreed statement of facts: The defendant, a druggist at Salem City, in the Greenwood district of Sebastian county, on the 15th day of March, 1880, sold as medicine, and upon the prescription of a practicing physician of said town, to one T. C. Miller, a half pint of whisky; that the same was bought for and used as medicine; that whisky is often prescribed by physicians, and used with beneficial effect in the treatment of disease; and that the defendant did not have a license from the County Court to sell liquors.

The first section of the act of March 8, 1879, regulating the liquor traffic, read as follows: "That it shall not hereafter be lawful for any person to sell any ardent, vinous, malt or fermented liquors in this State, or any compound or preparation thereof commonly called tonics, bitters, or medicated liquors, in any quantity, or for any purpose whatsoever, without first procuring a license from the County Court of the county in which such sale is to be made, authorizing such person to exercise such privilege; provided, manufacturers of ardent, vinous, malt or fermented liquors can sell in original packages without license; provided, further, that said original packages shall not contain less than five gallons."

No saving, it is seen, is made as to sales by druggists, or for medical or any other purpose, but the sale for any purpose whatever is explicitly prohibited.

The power of the legislature, in the exercise of the police authority of the State, to regulate the sale of liquors, has been too well settled by the courts of the country to be now called in question. *Whittington, Ex parte*, 34 Ark. 394; *Metropolitan Board v. Barrie*, 34 N. Y. 657; *Mason v. Lancaster*, 4 Bush, 406; *Keller v. State*, 11 Md. 525; *Perdue v. Ellis*, 18 Ga. 586; *Dorman v. State*, 34 Ala. 216; *Bancroft v. Dumas*, 21 Vt. 456; *Goddard v. Jacksonville*, 15 Ill. 588; *State v. Allmond*, 2 Houst. 612; *Commonwealth v. Intoxicating Liquors*, 115 Mass. 153; *License cases*, 5 How. 504; *Cooley Const. Lim.* 725.

The method and means of such regulation must be referred to the wisdom and discretion of the legislature; and we must suppose that in framing the act the defendant has been convicted of violating, it took into consideration and had proper and due regard to the claims of humanity and the actual wants and real necessities of the people.

It is not at all probable that the purchaser of the whisky in this

case could not have procured it from some licensed dealer, and that any actual suffering, or any thing more than mere inconvenience, if that, could have occurred from the defendant's refusal to sell it to him.

The end intended by the act is the preservation of society from the manifold evils and afflictions—the intemperance, disease, poverty and crime, which directly result from the sale of intoxicating liquors.

If individual cases of inconvenience, or even hardship, are occasioned by the act, it should be borne in mind, that regard be had for the public welfare, is the highest law.

Judgment affirmed.

REDMOND V. STATE.

(35 Ark. 58.)

Criminal law—intent—selling liquor to minor.

Under a statute forbidding the selling of intoxicating spirits to minors without written consent of parents, an honest belief that the purchaser is of full age will not absolve the seller in case of mistake.*

CONVICTION of illegally selling intoxicating spirits to a minor. The opinion states the case.

Coody, for appellant.

Henderson, attorney-general, *contra*.

ENGLISH, C. J. At the January term, 1880, of the Circuit Court of White county, Daniel Redmond was indicted for selling intoxicating spirits to a minor. The indictment charged that “the said Daniel Redmond, on the 18th day of December, 1879, in the county of White, etc., then and there unlawfully did sell intoxicating spirits to wit, peach brandy, to Andrew Vincent, a minor under the age of twenty-one years, without the consent or order in writ-

* *Contra*: *Faulks v. People* (39 Ala. 200), 38 Am. Rep. 374. See *Dotson v. State* (33 Ala. 141), 34 Am. Rep. 2.

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ing of the parent or guardian of said minor, the said Andrew Vincent, against the peace," etc.

Defendant pleaded not guilty, and by consent of parties, the case was submitted to the court, sitting as a jury, on the following agreed state of facts :

"That defendant, on the 18th of December, 1879, in the county of White, etc., did sell to the said Andrew Vincent intoxicating spirits, to wit, two drinks of peach brandy, without the consent or order in writing of his parent or guardian. That at the time of the sale, the said Vincent was under the age of twenty-one years, but lacked only about three months of being of full age. That the defendant, from his appearance, probably thought the said Vincent was of age. That his brother, who was of full age, was with him and drank with him at the time, and that said Vincent had been doing business for himself and father, transacting the business of the farm in buying and selling and managing the same, for more than two years, his father being an invalid, and unable to attend to business."

Whereupon defendant offered to prove by two witnesses : "That they were well acquainted with said Vincent; that on or about the same day he had stated to one James J. Gentry that he was of full age, and obtained from him whisky by such representation; that on the 17th day of November, 1879, and about one month before this selling, the said Vincent had stated to defendant, in his house of business, that he was twenty-one years of age, and obtained from him whisky upon such statement."

Upon the objection of the State, this evidence was excluded by the court, and defendant excepted.

Upon the agreed statement of facts the court declared the law applicable to the case to be : "That if a person intentionally sells intoxicating spirits to a person who in point of fact is at the time under twenty-one years of age, without the consent or order in writing of the parent or guardian of such minor, the offense for which the defendant is indicted is committed, regardless of whether the defendant was informed or even believed he was of age." To which defendant excepted.

Upon the facts agreed on, and the law so declared, the court found defendant guilty, and fined him \$50. He moved for a new trial, which was refused, and he took a bill of exceptions, and appealed.

Section 19 of the act of the 8th of March, 1879 (Acts of 1879, p. 38), follows: "Any person who shall sell either for himself or another, or be interested in the sale of, any ardent, vinous, malt or fermented liquors, or any compound or preparation thereof, called tonics, bitters or medicated whisky, to any minor, without the written consent or order of the parent or guardian, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be fined in any sum not less than fifty nor more than one hundred dollars."

This section is more comprehensive than section 1609 Gantt's Digest, increases the minimum penalty of the offense, and by implication repeals it.

Counsel for appellant complains that he was indicted under the former act, and punished under the latter. How he gets at that we do not see. It is not the practice to refer in an indictment to the statute under which it is framed. The indictment is good under the last act, and it is not to be presumed that the prosecuting attorney drafted it under the repealed act.

This court has decided that it is no excuse or justification to one who solemnizes a marriage between minors, without the consent of the parents or guardian, that the parties to the marriage informed him that they were of age; that he acts at his peril, and must ascertain the facts. *Sikes v. State*, 30 Ark. 496; *Smyth v. State*, 13 id. 696. These cases are analogous, in principle, to the one now before us.

A statute in Massachusetts makes punishable "the keeper of a billiard-room or table or bowling-alley, who admits a minor thereto without the written consent of his parent or guardian," and in *Commonwealth v. Emmons*, 98 Mass. 6, it appearing that one of the minors was almost twenty-one years old when admitted, that he did business independently of his parents, that he appeared to be fully grown, and on being asked by the defendant before his admission whether or not he was a minor, replied that he was not; this evidence was held to be immaterial, and it was excluded. BIGELOW. C. J., said: "The evidence excluded was immaterial. It did not tend to prove or disprove any essential fact. It did not show, or have any tendency to show, either that the alleged minors were of age, or that the defendant did not actually admit them to the billiard-room kept by him. Nor was it material to show that the defendant did not know or have reason to believe that the alleged

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minors were under age. The prohibition of the statute is absolute. The defendant admitted them to the room at his peril, and is liable to the penalty, whether he knew them to be minors or not. The offense is of that class where knowledge or guilty intent is not an essential ingredient in its commission, and need not be proved." *Commonwealth v. Boynton*, 2 Allen, 160; *Commonwealth v. Farren*, 9 id. 489; *Commonwealth v. Waite*, 11 id. 264.

In *State v. Hartfield*, 24 Wis. 60, which was a case of selling liquor to a minor, the evidence for the prosecution showed that defendant inquired of the minor, before letting him have the liquor, whether he was of age, and received an answer in the affirmative, and also showed that the minor was six feet and one inch in height. The jury were instructed that ignorance or mistake on the part of the accused, as to the age of the minor, was no defense, and he was convicted. The question of the correctness of the instruction was certified to the Supreme Court. DIXON, C. J., said: "The words 'knowingly' or 'willfully,' or other words of equivalent import, are omitted from the statute, and the offense is made to consist solely in the fact of a sale of intoxicating liquors or drinks to a minor." The authorities cited are to the effect, that where a statute commands that an act be done or omitted, which in the absence of such statute might have been done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute, will not excuse its violation," citing cases.

"Of this nature," as observed by Professor Greenleaf, "are many fiscal, police and other laws and regulations, for the mere violation of which, irrespective of the motives or knowledge of the party, certain penalties are enacted; for the law in these cases seems to bind the party to know the facts, and to obey the law at his peril. The act in question is a police regulation, and we have no doubt that the legislature intended to inflict the penalty, irrespective of the knowledge or motives of the person who has violated its provisions. Indeed, if this were not so, it is plain that this statute might be violated times without number, with no possibility of convicting offenders, and so it would become a dead letter on the statute book, and the evil aimed at by the legislature remain almost wholly untouched. To guard against such results, the legislature has in effect provided that the saloon-keeper, or other vendor of intoxicating liquors or drinks, must know the facts—must know that the person to whom he sells is a qualified drinker within the mean-

ing of the statute; and if not, he acts at his peril in disobeying the requirements of the law." The court decided there was no error in giving this instruction.

Mr. Bishop criticises the above decisions, and cites an Indiana case (*State v. Kalb*, 14 Ind. 403), to the contrary. Bishop Stat. Crimes, § 1021, etc. But they are in harmony with our decisions on the marriage act above cited.

In *Smyth v. State*, *supra*, Chief Justice WATKINS said: "The law intends to prohibit and punish the act (of solemnizing a marriage between minors without the consent of parent or guardian) as a misdemeanor, without regard to the criminal intention. If it does not, there would seldom be wanting enough of excuses to make it a dead letter."

So, in *Bain v. State*, 61 Ala. 75, it was decided that where one sells or gives spirituous liquors to a minor, without the requisition of a physician, the gift or sale is evidence of the intention, and there can be no inquiry as to whether the defendant had the specific intent to violate the law.

Pause v. State, 55 Ala. 16, favors Mr. Bishop's view of the question.

There is no doubt that the decisions of other States are in conflict on the subject, but the protection of minors against the mischief intended to be prevented by the statute, which is absolute in its terms, will be promoted by an adherence to the principle settled in the decisions under the marriage act. This rule may tend to induce sellers of intoxicating liquors to be cautious to guard against selling to minors without the written consent or order of parent or guardian.

It follows that the court below did not err in its declaration of the law applicable to the case, nor in finding appellant guilty on the agreed state of facts.

The fact however that the minor represented to appellant that he was of age, taken in connection with his appearance, was admissible, in mitigation of the fine to be inflicted, within the statute limits, as held in *Sikes v. State*, *supra*, but inasmuch as the court fixed the fine at the lowest amount prescribed by the act, appellant was not prejudiced by its exclusion.

Judgment affirmed.

ANSLEY V. STATE.

(36 Ark. 67.)

Statute—construction—playing cards for mere amusement.

A statute forbidding "any game of cards, dice, or other gaming device" at any tavern or dram-shop, does not include the playing of cards without any bet or stake depending thereon.*

CONVICTION of illegally permitting games of cards. The opinion states the case.

Williams & Battle, for appellant.

Moore, attorney-general, *contra*.

HARRISON, J. The appellant, a licensed keeper of a dram-shop, was indicted for permitting games of cards to be played in it. There was no proof that any thing was bet upon the games, but the evidence was that they were played for amusement. Being convicted, he moved for a new trial, upon the ground that the verdict was not warranted by the evidence, which was refused.

Section 1594, Gantt's Digest, under which the indictment was found, is as follows: "If any person having a license to keep a tavern or dram-shop, shall knowingly permit any person to play at any game of cards, dice, or other gaming device, within his house, outhouse, curtilage or inclosure, he shall be deemed guilty of a misdemeanor, and on conviction, in addition to the punishment prescribed by law for such offenses, his license shall be canceled."

Bouvier defines gaming to be "a contract between two or more persons, by which they agree to play by certain rules at cards, dice, or other contrivances, and that one shall be the loser and the other the winner." Bishop says: "And even the word gaming, without the prefix unlawful, seems usually to imply something of an unlawful nature, by betting on the sport; being indeed ordinarily an ingredient in its signification; or a game of an evil or immoral tendency." And so in England, where a tavern licensed contained the provision that the party licensed "do not knowingly suffer any un-

*Compare *Woods v. State*, *ante*, 22.

lawful games, or any gaming whatsoever, on the premises," the court held the provision not to be infringed by allowing dominoes to be played there. Said Lord CAMPBELL, C. J.: "Parties may play at a game which is not in itself unlawful, without gaming." And he added: "If money is staked it is gaming, and a publican may be lawfully convicted for that; but this conviction does not state that such was the case." Bish. Stat. Crimes, § 860. To constitute gaming," said Judge GREEN, in *State v. Smith*, Meigs, 99, "there must not only be betting upon the determination of an event, but the course of action to bring about such event must have been originated and commenced with a view to determine the bet." *Harrison v. State*, 4 Cald. 195; *Regina v. Ashton*, 16 Eng. L. & Eq. 346.

The intention of the legislature was, we think, to prevent the playing of games for money, or other stake, in taverns and dram-shops, and to suppress the pernicious vice of gambling — and not to prohibit the playing in such places, of games merely for recreation or amusement.

A new trial should have been granted.

The judgment is reversed, and the cause remanded.

Judgment reversed.

HAWKINS V. MIMS.

(36 Ark. 145.)

Surety — indulgence to principal — release of debtor from prison.

A receiver was imprisoned for not paying over money in obedience to an order of court. He was released with the assent of the party to whom he was ordered to pay the money. *Held*, that this did not discharge the surety, although he was able to pay when in prison, and afterward became insolvent.

ACTION on receiver's bond. The opinion states the facts. The plaintiff had judgment below.

Dan. Jones, for appellant.

Williams & Battle, for appellees.

Hawkins v. Mims.

SMITH, S. J. This action was brought against the surety on a receiver's bond to recover the fund shown to be in the hands of the receiver by his settlement with the court which had appointed him; which fund the receiver, by final decree entered in the suit, had been adjudged to pay over to the appellee, Mims, as administrator of the estate of Waddell. The defense was that the receiver had been attached for disobedience to the order to pay over and had been afterward discharged from custody, upon his personal recognition, the said Mims consenting to such discharge; that the receiver had the ability to comply with said order, and payment of the money might have been coerced by sending him to jail; that the receiver had since left the State and had no property therein. And it was claimed that the acquiescence of Mims in the release of the receiver had exonerated the sureties on the bond. To the answer setting up this defense a demurrer was sustained; and the defendant electing to stand upon his answer, final judgment was rendered against him and he removed the case here.

The answer presents no defense to the action. In principle it does not differ from a plea by a surety, that when the obligation fell due the principal was solvent, and the creditor neglected and forbore to sue him until he became insolvent, which was adjudged bad in *King v. State Bank*, 9 Ark. 185; or from a plea that the obligee in a bond had failed to prove the claim against the estate of the second obligee, whereby the claim was barred by the statute of non-claim, which was condemned in *Ashby v. Johnson*, 23 Ark. 163.

In *Wright v. Simpson*, 6 Vesey, Jr., 734, Lord ELDON observes that he "never understood that as between obligee and surety there was any obligation of active diligence against the principal. The surety is a guarantee and it is his business to see whether the principal pays and not that of the creditor."

There is a substantial distinction which is clearly pointed out by Judge HARE in his valuable note to the case of *Pain v. Packard*, 2 Am. Lead. Cas. 402 (5th ed.), between those remedies with which a creditor is invested by law and those which are conferred by act of the parties. "The former are rights which need not be pursued further than the creditor thinks fit; the latter, trusts, held for the benefit of others as well as his own, and which must consequently be executed with good faith and diligence. In the one case his duties are merely passive; in the other they are so far active that he may be answerable for laches or supineness in the management

of that which he has received. He may therefore refrain from issuing execution against the principal, even where his estate is manifestly diminishing in value and becoming less adequate to meet his obligations. And the better opinion would seem to be, that he is not responsible for suffering judgment to expire, or abandoning a lien acquired by an attachment or execution, unless the execution of the writ has gone far enough to operate as a virtual payment or satisfaction of the debt."

Mere delay, then, or negligence on the part of the creditor to call upon or compel the principal debtor to pay, gives the surety no defense. It is only acts which tend to prejudice him, or to deprive him of the power of obtaining indemnity, which have that effect. Of course if the obligee releases any of his securities, or enters into a new contract with the principal, varying the terms of the original agreement, or stays execution after its levy on the property of the principal, whereby the lien is lost, or does any other act, the necessary effect of which is to discharge the principal from the debt or to lessen his responsibility, the non-assenting surety will be discharged, for such acts increase the surety's risk. *Smith v. Tunno*, 1 McCord Ch. 443; *Baker v. Briggs*, 8 Pick. 122; 20 Am. Dec. 311; *Sneed's Ex'r v. White*, 3 J. J. Marsh, 525; *Dixon v. Ewing*, 3 Ohio, 280; 17 Am. Dec. 590 *Commissioners v. Ross*, 3 Binn. 520; *Baird v. Rice*, 1 Call (Va.), 18; *Bullitt v. Winstons*, 1 Mun. 283.

But Mims has done nothing which disables him from pursuing the receiver at any time. He has never had the means of satisfaction actually or potentially in his hands. The discharge of the receiver from custody must be referred to the humanity of the court and not to a reckless disregard by Mims of the rights of the appellant. The court was perhaps convinced that it was out of the power of the receiver to comply with its order. If the receiver had gone to jail, he must have been discharged upon the adjournment of the court. Imprisonment for debt, except in cases of fraud, has been abolished in this State.

The consent of Mims that the receiver might be released from custody upon his personal recognizance to appear at the next term of court could have no greater effect than the discontinuance of a suit once brought against the principal. It has been frequently decided that this does not discharge the surety. *Fulton v. Mathews*, 15 Johns. 433; 8 Am. Dec. 261; *Manning v. Shotwell*, 2 South. 584.

The case of *Pain v. Packard*, 13 Johns. 174, cited for appellant, established in New York the doctrine that the surety is exonerated if upon request made to the holder of the obligation to prosecute the principal, an action was not brought. And this principle has been incorporated into our jurisprudence by legislative enactment, with certain limitations as to the form of the notice and the time within which the creditor must sue after being served with notice. But it is expressly provided that the principle shall have no application to bonds given by officers or trustees, to secure the performance of the duties of their office or trust. Gantt's Dig., § 5696-7-8.

There is an anomalous case (*People v. Jansen*, 7 Johns. 332; 5 Am. Dec. 275) not noticed in the briefs filed here. It was an action against the heirs of a surety, on a bond given for the faithful discharge of the duty of a loan officer, under a statute of New York. And it was held that the surety might set up in his defense the laches of the supervisors in not discharging and prosecuting the loan officer for his first default, but suffering him to continue, after repeated defaults, for more than ten years, and until the loan officer had become insolvent. The decision has been undermined, if not virtually overruled, by *People v. Berner*, 13 Johns. 383; *People v. Foot*, 19 id., 58; *Looney v. Hughes*, 26 N. Y. 514, where an act required the county treasurer to issue a warrant against a delinquent town collector, in twenty days, and it was held to be no defense for the sureties that if the warrant had issued against their principal within the time prescribed by law, the amount due might have been collected of him; by *Supervisors v. Otis*, 62 N. Y. 88, where it was ruled that no laches upon the part of an obligee or creditor, or non-performance of some act which might prevent loss to a surety, would in the absence of an express covenant or condition discharge a surety, but the neglect must be of some positive duty to him, and by *Hubbard v. Gurney*, 64 N. Y. 461. Outside of New York, the principle of *People v. Jansen* has been almost universally repudiated by the courts.

We have not forgotten that at common law, the release of a debtor, whose person was in execution upon a *capias ad satisfaciendum*, extinguished the judgment itself. But a proceeding for contempt can not interfere with the prosecution of any other remedy to which Mims may be entitled, except that he can not be paid twice.

The remedy of a surety, who is dissatisfied with the degree of

activity displayed by the creditor in the pursuit of his principal, is to pay the debt himself. This subrogates him to all the rights and remedies of the creditor, and he can then manage the affair to suit himself.

The judgment of the court below is affirmed.

Judgment affirmed.

STATE V. WILLIFORD.

(26 Ark. 155.)

Execution — exemption — debt on bail-bond.

A judgment debtor on a bail-bond to the State is entitled to the statutory exemptions on execution issuing on contract debts.*

SUPERSEDEAS of execution. The opinion states the facts.

L. Gregg, for appellant.

B. R. Davidson, for appellee.

ENGLISH, C. J. It appears from the transcript of the record in this case, that on the eighth of December, 1877, one William Williford was in custody before a justice of peace of Washington county, charged with forgery and grand larceny, and was admitted to bail by the sheriff, under an order of the magistrate, in the penal sum of \$500 for his appearance for examination on the tenth of the same month, and Elizabeth Williford and John Fletcher became his sureties in the bail-bond. That he failed to appear according to the condition of the bond, and there was a forfeiture.

That suit was brought on the bond, in the name of the State, against the sureties, in the Circuit Court of Washington county, and on the twenty-ninth of July, 1879, judgment was rendered against them for \$500, the penalty of the bond, and for costs.

That on the fifth of November, 1879, an execution was issued on the judgment, and on the twenty-ninth of the same month levied by the sheriff on a crib of corn supposed to contain 200 bushels, more or less, as the property of the defendants therein.

* Compare *Whiteacre v. Rector* (20 Gratt. 714), 26 Am. Rep. 490.

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That the defendants severally scheduled the corn levied on with other personal property, as exempt from execution, before the clerk of the court, who issued a *supersedeas*, and the execution was returned, etc.

That at the January term of the Circuit Court, 1880, the State, by her prosecuting attorney, filed a petition, setting out the facts, and praying the court to quash the *supersedeas* issued by the clerk.

On the hearing of the motion, the court specifically found the fact to be "that the State recovered judgment against defendants on a bail-bond given in a criminal prosecution for \$500; and while the judgment was in full force, an execution was duly issued thereon, and levied upon 200 bushels of corn belonging to defendants. That they respectively owned property, said Fletcher to the amount of \$329.20, and said Williford \$288 (including the corn, each claiming part of it), within said county of Washington; and that they had duly scheduled and claimed the same as exempt from execution, and that the clerk who issued said execution had issued a *supersedeas* against said execution, upon which said 200 bushels of corn were released from said levy, and said execution returned unsatisfied."

It was agreed that Elizabeth Williford and John Fletcher were residents and citizens of Washington county, and each the head of a family, and that their schedules were in regular form, etc.

And the court declared the law to be: "That upon a judgment in favor of the State upon a bail-bond forfeited in a criminal prosecution, and an execution issued thereon, the defendants in such an execution have the same right to schedule their property against such execution as by law they have to schedule property levied upon an execution issued upon a judgment recovered in an action of debt by contract between private persons."

The court refused to quash the *supersedeas*, and the State took a bill of exceptions, and appealed.

"The personal property of any resident of this State, who is married or the head of a family, in specific articles to be selected by such resident, not exceeding in value the sum of five hundred dollars, in addition to his or her wearing apparel, and that of his or her family, shall be exempt from seizure on attachment, or sale on execution or other process from any court, on debt by contract." Art. 9, § 2, Const. 1874.

The bail-bond in question was a debt by contract. Appellees

contracted and bound themselves by the bond to pay the State \$500, if their principal did not keep its condition.

The only question in the case is, were appellees entitled to the exemption claimed by them as against the State, which is not expressly named in the exemption clause of the Constitution above copied?

It is an old maxim of the common law, that "the king is not bound by any statute, if he be not expressly named therein, unless there be equivalent words, or unless the prerogative be included by necessary implication; for it is inferred *prima facie* that the law made by the crown, with the assent of lords and commons, is made for subjects, and not for the crown; but this rule seems to apply only where the property or peculiar principles of the crown are affected; and this distinction is laid down, that where the king has any prerogative, estate, right, title or interest, he shall not be barred of them by the general words of an act, if he be not named therein. Yet if a statute be intended to give a remedy against a wrong, the king, though not named, shall be bound by it; and the king is impliedly bound by statutes passed for the public good, the relief of the poor, the general advancement of learning, religion and justice, or for the prevention of fraud," etc. *Broom's Leg. Maxims* (4th ed.), pp. 84-5; marg. p. 51.

In the United States the same principle has been held applicable to Federal and State governments, not upon any notion of prerogative, for even in England, where the doctrine is stated under the head of Prerogative, this, in effect, means nothing more than that this exception is made from the statute for the public good, and the king represents the nation. The real ground is a great principle of public policy — which belongs alike to all governments — that the public interests should not be prejudiced by the negligence of public officers to whose care they are confided. *United States v. Knight*, 14 Pet. 315, *Thompson on Homesteads and Exemptions*, § 385.

The rule was applied in *Cole v. White County*, 32 Ark. 51, where it was said: "It is also another well settled rule, that in the construction of statutes declaring or affecting rights and interests, general words do not include the State or affect its rights, unless it be specially named, or it be clear by necessary implication, that the State was intended to be included."

Section 1 of article 9 of the Constitution provides, that "the

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personal property of any resident of the State, who is not married or the head of a family, in specific articles to be selected by such resident, not exceeding in value the sum of \$200, in addition to his or her wearing apparel, shall be exempt from seizure on attachment or sale on execution, or other process from any court, issued for the collection of any debt by contract," etc.

The next section, copied above, extends the exemption in favor of a married person, or head of a family, to personal property to the value of \$500. This enlargement of the exemption was in favor of families.

It was a humane public policy for the benefit and protection of the poor, who are the largest class of communities. The purpose of the framers of the Constitution was to secure them in the possession of the means of subsistence and of making a support. The exemptions of personal property in the two sections were for the relief of the poor, and acts for the relief of this class are within an exception to the above rule that the State is not embraced unless named.

In *Doe v. Deavors*, 11 Ga. 79, a case involving the question of the exemption of personal property from execution under a statute of Georgia, the court, recognizing the general rule that the State is not bound by a statute unless named, and the exceptions to the rule as stated in the old books, said: "In our judgment, the State falls within the operation of a public law, passed for the benefit of the poor, and the State is within the policy of our own legislation upon this subject-matter."

There the property exempted for the benefit of a family was levied upon under an execution for taxes. Here no personal property is exempt from sale for taxes, but for debts by contract.

In *State v. Pitts*, 51 Mo. 133, the State recovered a judgment against a surety on a forfeited recognizance, upon which an execution was issued, and levied on defendant's homestead, who claimed that it was exempt. The State was not named in the statute exempting homesteads, nor in the statute exempting certain personal property from execution. The court held that the statutes had a common object in view. That in the latter it was to allow the family, for their comfort and support, to keep certain necessary articles of personal property of which they could not be deprived, and in the former to have a secure and permanent home, free from the attacks of all creditors. That from the language in the enactments, and

the history of the Missouri legislature on the subject, the court was of opinion that the State was included by implication, and did not stand in an attitude different from any other creditor.

There have been similar decisions in Illinois. *Conroy v. Sullivan*, 44 Ill. 451; *Loomis v. Gerson*, 62 id. 13.

There was a like ruling in *Commonwealth v. Lay*, 12 Bush, 283; s. c., 23 Am. Rep. 718.

In *Brooks v. State*, 54 Ga. 37, the court recognizing the rule that the State was embraced by implication in the general words of a statute enacted for the support of the poor, held that the home-
stead of a defaulting tax-collector was not exempt.

No harm can come to the State from holding that sureties in a forfeited bail-bond may claim the benefit of the constitutional exemption of personal property as against her.

The statute makes it the duty of officers taking bail, to require sureties to make affidavit that they are residents of the State, and owners of visible property, over and above that exempt from execution, to the value of the sum in which bail is required, and that they are worth that amount after the payment of their debts and liabilities. Gantt's Digest, §§ 1719-20.

If the officer fail to discharge his duty, he is subject to removal. If the sureties make false oaths, they may be punished for perjury.

Fletcher had a wife and children. Mrs. Williford was a widow with children. Looking at their schedules, each of them seems to have owned a horse, a few hogs, some farming implements, household and kitchen furniture, part of the corn levied on, and one of them a cow and calf. The court found the aggregate value of their property to be \$617.20. If all their property had been sold under the execution, it is probable it would not have brought more than the debt and costs, and the two families would have been left destitute — perhaps a charge upon the public, or objects of charity.

This is but a single example, but it illustrates the policy of the exemption clause of the Constitution in question, and furnishes a reason for holding that the State is included by implication.

It is to be hoped, for the credit of appellees (and the officer who took the bail-bond), that they had more property when they executed the bond, and made the affidavit required by law, than they had when they filed their schedules.

The judgment must be affirmed.

Judgment affirmed.

Anderson v. Pearce.

ANDERSON V. PEARCE.

(36 Ark. 293.)

Agency — instrument by public officer — mode of executing.

A due bill "for work done on the Hazel Valley school-house and hall," and signed by two individuals with the addition "committee," is the personal obligation of the signers.*

ACTION on a due-bill. The opinion states the case. The plaintiff had judgment below.

R. B. Davidson, for appellant.

U. M. Rose, for appellee.

HARRISON, J. This was an action by S. V. Pearce and William T. M. Stewart, partners in the carpenter's trade under the firm name of Pearce & Stewart, against O. I. Anderson and S. J. Hopkins, upon the following instrument:

"August 28, 1878.

"Balance due Pearce & Stewart, one hundred and seventy-eight dollars (\$178), for work done on Hazel Valley school-house and hall.

"O. I. ANDERSON,

"S. J. HOPKINS,

"Committee:"

The complaint alleged that the instrument was given to the plaintiffs for work and labor done and performed by them at the instance and request of the defendants in and about the building of a house known as the "Hazel Valley school-house and hall," and that they thereby promised to pay them the sum of money herein mentioned on demand.

[Omitting a minor consideration.]

The appellant also insists that the instrument sued on does not import a promise or obligation of the makers to pay the sum of money specified in it.

*See *contra*, *School town of Monticello v. Kendall* (72 Ind. 91), 37 Am. Rep. 130, and note 142.

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The word "committee," following the signature of the makers, does not evince an intention that they themselves were not to be bound, or that the debt thereby admitted was not their own.

Daniel, in his work on Negotiable Instruments, says: "If the agent sign a note with his own name and discloses no principal, he is personally bound. The party so signing must have intended to bind somebody upon the instrument, and no promisor but himself therein appearing, it must be construed as his note, or as a nullity. And though he term himself 'agent,' such suffix to his name will be regarded as a mere *descriptio personæ*, or as an ear-mark of the transaction, and may be rejected as surplusage." 1 Dan. Neg. Inst. § 305; *Graham v. Campbell*, 56 Ga. 258; *Collins v. Buckeye State Ins. Co.*, 17 Ohio St. 215; *Williams v. Robbins*, 16 Gray. 77; *Arnold v. Sprague*, 34 Vt. 402.

[A minor holding omitted.]

The judgment is affirmed.

Judgment affirmed.

CLAYTON V. JOHNSON.

(36 Ark. 406.)

Assignment for benefit of creditors—condition for release.

An assignment of all an insolvent's property for the benefit of creditors, conditioned for a full release from the creditors accepting it, is not invalid.*

REPLEVIN. The opinion states the point. The plaintiff had judgment below.

N. T. White and Met. L. Jones, for appellants.

Bell & Elliott, for assignee.

ENGLISH, C. J. [Omitting immaterial statement and other points.] The court below refused to declare the law to be that the deed was fraudulent and void as to the dissenting creditors, because

* See *contra*, *Hubbard v. McNaughton*, *post*.

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of the clause in it that no creditor should participate in the assets unless he accepted the same in full of his claim.

Under the Assignment Act, the assignee is required to sell all the property assigned to him for the payment of debts, at public auction, within one hundred and twenty days after the execution of the bond, which he is required by the act to give.

An insolvent debtor cannot therefore by assignment tie up his property in the hands of an assignee for an indefinite period, with the view to coercing any reluctant creditors to accept a provision which they may dislike.

By the Statute of Frauds, "Every conveyance or assignment, etc., made or contrived with the intent to hinder, delay or defraud creditors, or other persons of their lawful actions, damages, forfeitures, debts or demands, as against creditors and purchasers prior and subsequent shall be void." Gantt's Dig., § 2954.

In *McCain v. Pickens*, 32 Ark. 399, there was a provision in the deed of assignment, that accepting creditors should release the assignor, but it did not appear that any creditor accepted the provisions of the trust, and the court held that their assent to such an assignment would not be presumed. The question whether the deed was fraudulent and void, because of such provision for a release, was not presented, nor has it heretofore been decided by this court.

In England, a stipulation in an assignment for the release of the debtor as a condition of receiving the benefit of the deed, has been held valid even against a claim of the crown (*King v. Watson*, 3 Price, 6), and such stipulations continue to be inserted in the forms now in use. Burrill on Assignments (2d ed.), 156.

In *Jackson v. Lomas*, 4 T. R. 166, there was a proviso to the assignment, that in case any creditor should not execute the trust deed, which contained, among other things, a release of the debts, by a given day, he should not be entitled to the benefit of it, and the validity of the deed seems to have been conceded. There was also a provision in the deed that the share of any non-accepting creditor should be paid back to the debtor. KENT, commenting on that case (2 Com. 534, 12th ed., p. 736), says that such a reservation for the benefit of the debtor would render the deed invalid under many of the American decisions.

The leading American case on the precise question now before us is *Brashear v. West*, 7 Pet. 608. In that case, West executed a

deed in April, 1807, at Philadelphia, by which he conveyed to trustees, all his estate, real, personal and mixed, in trust to sell the same as soon as conveniently might be, and to collect all debts due to him, and to pay and discharge the debts due from him, first to certain preferred creditors, and afterward to creditors generally; "provided, nevertheless, that none of the above described creditors shall be entitled to receive any part or dividend of the property hereby conveyed, or its proceeds, who shall not, within ninety days from the date hereof, sign and execute a full and complete release of all claims and demands upon said West, of any nature or sort whatever." Chief Justice MARSHALL, who delivered the opinion of the court, said: "The most serious objection to the deed is, that it excludes all creditors who shall not, within ninety days, execute a release of all claims and demands on said West of any nature or kind whatever. The stipulation cannot operate to the exclusion of any portion of the debtor's property from the payment of his debts. If a surplus should remain after their extinguishment, that would be rightfully his. Should the fund not be adequate, no part of it is relinquished. The creditor releases his claim only to the future labors of his debtor. If this release were voluntary, it would be unexceptionable. But it is induced by the necessity arising from the certainty of being postponed to all those creditors who shall accept the terms by giving the release. It is not therefore voluntary. Humanity and policy however both plead so strongly in favor of leaving the product of his future labor to the debtor, who has surrendered all his property, that in every commercial country known to us except our own the principle is established by law. This certainly furnishes a very imposing argument against its being deemed fraudulent. The objection is certainly powerful that its tendency is to delay creditors. If there be a surplus, this surplus is placed, in some degree, out of the reach of those who do not sign the release, and thereby entitle themselves under the deed. The weight of this argument is felt; but the property is not entirely locked up. A court of equity, or courts exercising chancery jurisdiction, will compel the execution of the trust, and decree what may remain to the creditors who have not acceded to the deed. Yet we are far from being satisfied, that upon general principles, such a deed ought to be sustained. But whatever may be the intrinsic weight of the objection, it seems not to have prevailed in Pennsylvania. The construction which the courts of that State have put on the

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Pennsylvania Statute of Frauds, must be received in the courts of the United States. In *Lippincott v. Barker*, 2 Binney, 174, this question arose, and was decided, after elaborate argument, in favor of the validity of the deed. This decision was made in 1809, and has, we understand, been considered ever since as settled law. In *Pearpoint v. Graham*, 4 Wash. 232, the same question was made, and was decided, by Judge WASHINGTON, in favor of the validity of the deed. This decision was made in 1816. We are informed of no contrary decision in the State of Pennsylvania, and must consider it as the settled construction of their statute. The validity of the deed cannot now be controverted, no actual fraud being imputed to it."

This opinion of the Supreme Court of the United States was delivered by Chief Justice MARSHALL, in January, 1833.

The argument of Chief Justice TILGHMAN, in *Lippincott v. Barker*, 2 Binney, 180, in favor of the validity of the deed in that case, which was an assignment of all the debtor's property for the benefit of his creditors, with a condition for release, and without reservation for the benefit of the debtor, is very cogent and persuasive. The decision is not put upon any peculiarity in the Statute of Frauds of Pennsylvania, but upon principles announced.

This decision has been repeatedly followed in Pennsylvania, and has not been overruled. See references to the cases in Brightly's Digest, Title Assignment; Burrill on Assignment (2d ed.), 159.

In *Lea's Appeal*, 9 Barr. 506, the court said that the stipulation for a release was in accordance with the spirit of the bankrupt laws of the commercial world, and with the spirit of the age, that where an unfortunate debtor surrenders all his property to his creditors for their benefit, he ought to be allowed to begin the world again untrammelled, for his own benefit and that of his family.

The question was before the Court of Appeals of Virginia, 1837, in *Skipwith's Exr. v. Cunningham*, 8 Leigh, 271. The debtor made a general assignment to trustees to pay certain preferred creditors, and then all others *pro rata* who would execute a release, etc. The opinion of the court was delivered by HENRY ST. GEORGE TUCKER, president, who after showing that it was not against the statute of frauds for a merchant, in failing circumstances, to prefer one class of creditors to another, etc., said: "Next, it is said that the deed was a fraud upon the creditors generally, because it demanded a general release of the whole debt of each creditor, upon payment

of a part. On this subject a distinction has been made in the cases, between the conveyance of the whole, and the conveyance of a part only of the debtor's property, upon condition that the creditors should compound and accept a part of their debts and give a release for the residue. The former is considered admissible and valid — the latter as oppressive upon creditors and as fraudulent and pernicious in its tendencies. *Seaving v. Brinkerhoff*, 5 Johns. Ch. 332. The English cases are all founded upon the concession of the principle that such compositions are lawful, where the party has conveyed the whole of his property and there is no concealment or underhand agreement with particular creditors. *Cockshott v. Bennett*, 2 T. R. 763; *Jackson v. Lomas*, 4 id. 166. Such compositions are in spirit of the bankrupt laws, and can not therefore be branded with imputation of fraud. 'Humanity and policy,' says the chief justice of the United States, 'plead so strongly in favor of leaving the product of his future labor to the debtor who surrendered all his property, that in every commercial country known to us except our own, the principle is established by law.' (He means that the principle is established by the statute law, and compulsory). 'This furnishes a very imposing argument against its being a fraud. *Brashear v. West*, 7 Pet. 615. It is difficult indeed to imagine on what the right of composition by the assent of the creditors can be contested, if the right of preference be conceded. He who gives up his all, and who in doing so, has a right to pay one in exclusion of others, cannot justly be charged with fraud, because he prefers those who humanely surrender all claim to his future labors. To set aside such preference as fraudulent, is to deny the right to prefer, which, on all hands, is conceded. Accordingly, such agreements, if executed, are acknowledged to be valid and binding. *Heathcote v. Crooshanks*. 2 T. R. 24; *Lynn v. Bruce*, 2 H. Bl. 317. But it is not less true, that if they are of only part of the debtor's property, the transaction is oppressive upon the creditors, and fraudulent. A debtor is bound by duty to devote the whole of his property to the satisfaction of his creditors' demands. 7 Pet. 614. He can have no right, while he is full-handed, to extort from them a release of part of their just claims. * * * It is a contrivance on the debtor's part to protect and secure a part of his property from his creditors, and is therefore distinctly in conflict with that statute, which avoids every contract or conveyance of a debtor, contrived of purpose to hinder, delay or defraud creditors.

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He may protect his person, indeed, by a fair composition, and surrender of all his property, but he cannot protect a part of that property by giving up another part," etc.

This decision was followed in *Phippen v. Durham*, 8 Gratt. 457, and as late as 1863, in *Gordon v. Cannon*, 18 id. 387.

The question was before Judge STORY, 1826, in *Halsey v. Whitney*, 4 Mason, 206, on a deed by which a debtor made an assignment of all his property to a trustee, in trust, for certain of his creditors who should become parties to the assignment; and upon the consideration that they should release all their respective claims and demands upon him. After reviewing the adjudications, and showing that in Massachusetts the decisions left the question in *equilibrio*, he said: "In *Lippincott v. Barker*, 2 Binn. 174, where the direct point arose, it was settled, that a stipulation for a release was not fraudulent. The reasoning of the court is limited indeed to the circumstances of that particular case, but it would be difficult not to perceive that it naturally reaches further. I find also, that my brother, Mr. Justice WASHINGTON, in *Pearpoint v. Graham*, 4 Wash. 232, is reported to have held, that an assignment in trust, for the benefit of such creditors as should release their debts, is founded upon a sufficient consideration in law. The case is not in point, but it was properly decided on the general principle. There is however a case in England directly in point. It is, *The King in Aid of Braddoch*, 3 Price, 6, where the very exception was taken by counsel, and the assignment was held good by the Court of Exchequer against the claim of the crown itself. The weight of authority, then, is in favor of the stipulation; for the decisions in New York did not turn upon the naked point of a release, but upon that as incorporated in a peculiar trust. I am free to say, that if the question were entirely new, and many estates had not passed upon faith of such assignments, the strong inclination of my mind would be against the validity of them. As it is, I yield, with reluctance, to what seems the tone of authority in favor of them."

In his *Equity Jurisprudence*, 2d vol., § 1036 (12th ed.), Judge STORY said: Even a stipulation on the part of the debtor, in such an assignment, that creditors taking under it shall release and discharge him from all their further claims beyond the property assigned, will, it seems, be invalid." Citing in note, *Halsey v. Whitney*, 4 Mason, 206, and other cases.

In Alabama it was settled, by a series of adjudications, that a debtor could, in an assignment of all his property for the benefit of his creditors, making no reservation to himself, stipulate that the creditors accepting the assignment thus made should release him from all further liability. *Robinson v. Rapelye*, 2 Stew. 86; *Ashurst v. Martin*, 9 Port. 566; *West v. Snodgrass*, 17 Ala. 549; *Rankin v. Lodor*, 21 id. 380.

But by a provision of the Code of 1866, it was declared that an assignment stipulating for such release should be void as to creditors. *Perry Ins. and Trust Co. v. Foster*, 58 Ala. 502; s. c., 29 Am. Rep. 779.

In Maine a stipulation for a release was held valid. *Fox v. Adams*, 5 Greenl. 209; *Todd v. Buckman*, 2 Fairf. 11 Me. 41. But this was changed by statute. *Pearson v. Crosby*, 23 id. 263; *Wheeler v. Evans*, 26 id. 135.

In Maryland it has been decided, on principle, that the debtor might stipulate for a release, but there were dissenting opinions. *McCall v. Hinkley*, 4 Gill. 128; *Kettlewell v. Stewart*, 8 id. 502.

In *Haven v. Richardson*, 5 N. H. 125, the court concurred in the conclusion of Judge STORY (4 Mason, 223, 231), that an assignment containing a stipulation for a release was not fraudulent. Though it seems that afterward this was prohibited by statute. Burr. on Ass. (2d ed.) 162.

In South Carolina a stipulation for a release is valid. *Nixon v. Douglas*, 2 Hill Ch. 443; *LePrince v. Guillemot*, 1 Rich. Eq. 187.

In Rhode Island stipulations in general assignments, as conditions of preference, have always been allowed. Angell on Ass. 112; Burr. on Ass. (2d ed.) 163.

So in Vermont, before the act of November 8, 1843, prohibiting general assignments, stipulations for a release, as conditions of preference, were held valid. *Hall v. Denison*, 17 Vt. 310.

In *Grover v. Wakeman*, 11 Wend. 189, the cases are reviewed by Mr. Justice SOUTHERLAND, and a stipulation for a release held to avoid the assignment.

The adjudications are also reviewed in Burr. on Ass. (2d ed.) 156, 178, and shown to be in conflict.

The cases *pro* and *con* are also collected and cited in a note to Bump on Fraudulent Assignments, 433, and he thinks the weight of authority is against the validity of stipulations for release.

Clayton v. Johnson.

There is also a review of the cases in 1 Am. Lead. Cas. (Hare & Wallace notes) 71, etc., but no expression of opinion as to weight.

In some of the cases cited as against the validity of a deed, with a stipulation for release, the debtor assigned part of his property, and not the whole, and in others, reserved to himself the benefit of any surplus. Others are influenced by statutes prohibiting preference.

It was said in *Miller v. Conklin*, 17 Ga. 430, that the decisions sustaining the validity of a deed with a stipulation for a release, were made in the earlier days of the Republic, when our policy, legal and commercial, had but slightly diverged from that of Great Britain.

None of them however are as old as the common law, on which they were based, and which has not ceased to be of value on account of its venerable age. Moreover, some of our greatest lawyers and jurists lived in the earlier days of the Republic.

The authorities are in harmony, that an insolvent or failing debtor may make a valid assignment of all his property to preferred creditors, leaving others, unprovided for, to look to his future labor and acquisitions for the satisfaction of their claims.

This being so, why may he not prefer such as may give a release? Creditors refusing are simply unprovided for.

There being no statute in this State prohibiting it, there is nothing in the general statute against fraudulent conveyances which can be construed to prevent a debtor from assigning all of his property, without reservation of benefit to himself, to a trustee for the payment of his debts, with a stipulation for a release.

In the language of Chief Justice MARSHALL, both policy and humanity plead strongly in favor of leaving to the unfortunate debtor, who in good faith surrenders all his property to his creditors, the benefit of his future labor.

The question is by no means free of doubt, owing to the conflict of judicial opinions, but after looking over the whole field, and considering the cases *pro* and *con*, we have concluded to affirm the ruling of the court below on this point.

[Omitting minor points.]

Upon the facts of the case, appellee was entitled to maintain replevin for the goods as against appellant.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

TURPEN V. BOOTH.

(36 Cal. 65.)

Action — against grand juror.

No one is liable to a civil action for his erroneous and malicious conduct as a grand juror.

ACTION of damages for malicious presentment. The opinion states the case. The defendant had judgment below.

W. E. Turner, and D. S. Terry, for appellant.

G. W. Schell, for respondents.

MORRISON, C. J. The complaint in this case avers, that in the month of March, 1877, the defendants, and each of them, were duly, legally and in the manner and form prescribed by law, regularly impanelled and sworn by the County Court of Stanislaus county to serve as grand jurors for the term. That they, and each of them, took the oath prescribed by law, that "they would present no person through malice, hatred or ill-will," but that notwithstanding said oath, the defendants, and each of them, willfully disregarding such oath, and being actuated and influenced by a desire, and with a

determination to forever blast, tarnish and ruin the good name and reputation theretofore held and enjoyed by the plaintiff among his fellows and acquaintances, did willfully, wantonly and maliciously conspire together, and under the pretense of doing and performing their duties as members of said grand jury, pretend to receive and hear evidence against the plaintiff in a certain matter wherein the plaintiff was charged with illegal voting at the general election held in this State on the 7th day of November, 1876. And after the hearing of such evidence, notwithstanding they as such grand jurors, were positively instructed by the law officer of the county that no indictment could lie against the plaintiff upon said evidence, and that according to the evidence no crime whatever had been committed, and that no conviction could be had thereon, and notwithstanding the fact that no evidence had been produced, testified to, or heard before said defendants as such jury, in any manner implicating the plaintiff in the commission of said or any crime, these defendants as such grand jury, collectively and individually, willfully, falsely, and fraudulently, and without probable cause, and being possessed of actual malice and ill-will against this plaintiff, and for the sole purpose as aforesaid, corruptly did pretend to find a true bill and indictment against this plaintiff for falsely and illegally voting, etc., and such indictment was duly presented by the foreman of the grand jury, and was filed according to law.

"That said defendants, as such grand jurymen, well knew at the time there was accessible to them an overwhelming amount of testimony which would clearly show that the charge of illegal voting against this plaintiff was false and malicious, and without any foundation whatever: but they, so that they might the easier carry out their malicious design upon plaintiff, willfully and maliciously refused to call in or hear said testimony. That upon the indictment so found and presented by the defendants, the plaintiff was tried and acquitted, the trial jurors not leaving their seats."

We have stated sufficient averments of the complaint to show that the action is brought for the recovery of damages by a person against whom an indictment was found by the defendants acting as grand jurors of the county of Stanislaus, the gravamen of the action being the malicious conduct of said defendants in finding and presenting such indictment.

It is claimed in the first place that the evidence upon which the defendants found the indictment was insufficient to justify such a

finding; and in the second place, it is charged that there was exculpatory evidence which they refused to hear. The case presents the simple question, whether a grand juror is answerable civilly for damages for an act done by him as such grand juror, in a case where he acts upon insufficient evidence, and with a desire maliciously to injure the party against whom the indictment is found. The question is an interesting one, and this is the first case in which it has been presented in the Supreme Court of this State.

It is claimed on behalf of the defendants, that they are not liable, because the statute so declares; and that independent of any statute on the subject, they are exempt from all liability by the principles of the common law.

Section 927 of the Penal Code provides that "a grand jury cannot be questioned for any thing he may say or any vote he may give in the grand jury relative to a matter legally pending before the jury, except for perjury of which he may have been guilty, in making an accusation or giving testimony to his fellow jurors."

The plain import and meaning of the above language is that no grand juror shall be held liable for damages in a civil action for any thing done by him in the grand jury room, and this is but a statutory declaration of the principle as it existed at common law. In 1 Whart. Am. Cr. Law, § 509, it is said, that "in no case can a member of the grand jury be obliged or allowed to testify or disclose in what manner he or any other member of the jury voted on any question before them, or what opinions were expressed by any juror in relation to any such questions."

"The secret inquisitorial proceedings of the grand jury may, as they often have, work very oppressively and unjustly; for only so far as guarded and restrained by an oath, their action is generally irresponsible and conclusive in finding an indictment. During the whole of their proceedings, they are protected in the discharge of their duty, and no action or prosecution can be maintained, no matter how they may be actuated by malice or indiscretion." Prof. on Jury Trial, § 55.

"Nor can an action be maintained against a juror, or the attorney-general, or a superior military or naval officer, for an act done in the execution of his office, and within the purview of his general authority." 1 Chit. Pl. 89.

"But I prefer to place the decision on the broad ground, that no public officer is responsible in a civil suit for a judicial deter-

mination, however erroneous it may be, and however malicious the motive which produced it. Such acts, when corrupt, may be punished criminally, but the law will not allow malice and corruption to be charged in a civil suit against such an officer for what he does in the performance of a judicial duty. The rule extends to judges, from the highest to the lowest, to jurors, and to all public officers, whatever name they may bear, in the exercise of judicial power. It of course applies only when the judge or officer had jurisdiction of the particular case, and was authorized to determine it. If he transcends the limits of his authority, he necessarily ceases, in the particular case, to act as a judge, and is responsible for all consequences. But with these limitations, the principle of irresponsibility, so far as respects a civil remedy, is as old as the common law itself. The authorities on this subject are almost innumerable." *Weaver v. Devendorf*, 3 Den. 120, 121; and the numerous authorities there referred to.

The recent case of *Bradley v. Fisher*, 13 Wall. 335, is a very learned and instructive one on this question. That was an action brought by Bradley against Judge FISHER to recover damages alleged to have been sustained by the plaintiff, "by reason of the willful, malicious, oppressive and tyrannical acts and conduct of the defendant, whereby the plaintiff was deprived of his right to practice as an attorney in the Supreme Court of the District of Columbia."

The plaintiff used some threatening language to the defendant, out of court, for his conduct as judge, pending the trial of a cause, and the defendant therefore struck the plaintiff's name from the roll of attorneys practicing in that court. Justice FIELD, in delivering the opinion of the court, carried this principle of exemption to its utmost limits, and beyond the limit laid down by the Supreme Court of New York in the case in 3 Denio, 120. The Supreme Court of the United States there held, "that judges of courts of record of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously and corruptly; a distinction as to their liability being made between acts done by them in excess of their jurisdiction and acts done in the clear absence of all jurisdiction over the subject-matter."

The case of *Downer v. Lent*, 6 Cal. 94, is also in point. The court says: "It is beyond controversy that the power of the board

of pilot commissioners is *quasi* judicial, and that they are not civilly answerable. They are public officers to whom the law has intrusted certain duties, the performance of which requires the exercise of judgment."

This is equally true of grand jurors. They have certain duties to perform under the law of a *quasi* judicial character, and in the performance of such duties the law invests them with judgment and discretion. The grand jury was an essential part of the machinery of the County Court. They were not volunteers, but were engaged in the performance of a duty that was compulsory. In finding the indictment complained of, they acted within the legitimate sphere of their duty, and cannot be held civilly responsible. What is said by the learned judge in the case of *Scott v. Stansfield*, L. R. 3 Ex. 220 — "this provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public whose interest it is that the judges should be at liberty to exercise their functions with independence, and without fear of consequences" — is applicable to this case.

To hold grand jurors liable for damages in civil actions would be against the policy of the law, and we find no authority in the adjudged cases for so holding.

Judgment affirmed.

THORNTON, and MYRICK, JJ., concurred.

ANDERSON V. TAYLOR.

(56 Cal. 181.)

Damages — forcible entry and detainer — injury to credit — bodily and mental pain.

In an action of forcible entry and detainer, damages are not recoverable for injury to credit, nor for bodily or mental pain.

ACTION of forcible entry and detainer. The opinion states the case. The plaintiff had judgment below.

Frank Owen and A. C. Freeman, for appellant.

Selden, Hetzel & Crittenden, and Thornton, for respondents.

Anderson v. Taylor.

Ross, J. These appeals are embodied in one transcript, and were heard and submitted together.

The counsel who appeared for the appellants at the argument very properly conceded that the purported statement on motion for a new trial cannot be considered for any purpose. There is therefore left in the case but one question.

The action was forcible entry and detainer. The case was tried before a jury, and the following verdict returned: "We, the jury in the above-entitled cause, find the defendants (naming them) guilty of the forcible entry and detainer set forth in the complaint, and we assess the damages to plaintiffs at (\$550) five hundred and fifty dollars, and costs of suit."

The court below gave the plaintiffs judgment for the restitution of the premises, and also for the sum of \$1,650, being treble the amount of damages stated in the verdict.

The only averment in the complaint of damage to the plaintiffs is the following: "That, by reason of said acts of forcible entry and forcible detainer, as above set forth, plaintiffs have been injured in their credit and circumstances, and have suffered great bodily and mental pain and anguish, to their damage in a large sum of money, to wit: 'In the sum of five thousand dollars (\$5,000).' There does not appear to have been any demurrer to the complaint; and the question therefore is, whether the allegation quoted is sufficient to support the judgment in so far as it awards to the plaintiff \$1,650 as damages.

The statute provides, that "the jury, or the court if the proceeding be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, alleged in the complaint and proved on the trial, and find the amount of any rent due, if the alleged unlawful detainer be after default in the payment of rent, and the judgment shall be rendered against the defendant guilty of the forcible entry, or forcible or unlawful detainer, for three times the amount of the damages thus assessed, and of the rent found due."

"The damages occasioned to the plaintiff," spoken of in the statute as authorized to be assessed, are such only as are the natural and proximate result of the forcible entry or forcible or unlawful detainer, as the case may be. In 2 Greenl. Ev., § 256, it is laid down as a rule applicable to all damage, that "the damage to be recovered must always be the natural and proximate consequence

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of the act complained of ;” and in § 268, id., that “in the proof of damages, both parties must be confined to the principal transaction complained of, and to its attendant circumstances and natural results.” In *Kower v. Gluck*, 33 Cal. 401, it was held that damage sustained by the landlord to property adjoining the demised premises, in consequence of the tenant holding over, cannot be recovered in an action for an unlawful detainer. And in *Hicks v. Herring*, 17 Cal. 566, the rule as stated by Mr. Greenleaf is recognized and approved ; namely, that the damages must be limited to the natural and proximate result of the injury.

The damages claimed in the complaint in this case are such only as resulted to plaintiffs from injury to “their credit and circumstances,” and such as they sustained by reason of “great bodily and mental pain and anguish.”

In our opinion, an averment of damages sustained from these causes does not sustain a judgment awarding to the plaintiffs damages occasioned them by the forcible entry and detainer.

It results that the court below erred in entering judgment against the defendants, in favor of plaintiffs, for the sum of \$1,650, and that that portion of the judgment should be reversed and vacated, and that in all other respects the judgment should be affirmed.

So ordered.

McKINSTRY, and McKEE, JJ., concurred.

HOLMES V. RICHET.

(56 Cal. 307.)

Contract — arbitration — condition for.

A condition in a building contract that all disputes concerning the value of extra work shall be determined by arbitration, is valid, and precedent to recovery.*

ACTION to enforce mechanic's lien. The opinion states the case. The plaintiff had judgment below.

Robert J. Hayne and Van Dyke & Powell, for appellant.

J. H. Henry, for respondent.

*See *Campbell v. American Popular Ins. Co.* (1 McArthur, 246), 29 Am. Rep. 501, and note, 802.

MORRISON, C. J. [Omitting minor matters.] Pharo makes a claim for extra work, and this claim was allowed by the court below. The finding is as follows: "That during the progress of the work by defendant Pharo, under said contract, the defendant Richet requested certain alterations and additions to be made to said contract, specifications, and plans, and to said work and materials, to be done and furnished under said contract; that no written order was required for such alterations and additions; that defendant Pharo performed said alterations as requested, and that the extra work and materials done and furnished by defendant Pharo, by reason of said alterations and additions, were settled and agreed on by said Pharo and said architect to be worth the sum of \$195;" and this amount was allowed by the court for and on account of extra work done by Pharo. The allowance of this amount is complained of by the defendant Richet, and it is claimed that the allowance was contrary to the terms of the contract. The contract (which is set forth in the findings of the court) contains the following clause: "Should any dispute arise respecting the true construction or meaning of the drawings or specifications, the same shall be decided by the aforesaid P. Huerne, architect, and his decision shall be final and conclusive; but should any dispute arise respecting the true value of the extra work or works omitted, the same shall be valued by two competent persons, one employed by the owner, and the other by the contractor; and in case they cannot agree, those two shall have the power to name an umpire, whose decision shall be binding on all parties."

It appears from the pleadings in the case, that difficulties had arisen respecting the true value of the extra work, and the question here presented is, was it not the duty of the parties under the foregoing clause of the contract to have the said extra work valued by two competent persons? The finding of the court is, that the value of the extra work was agreed upon by the architect and Pharo; but it is claimed that the architect had no authority to bind the defendant Richet by any such agreement. By the terms of the contract, authority was given the architect to decide any dispute that might arise respecting the true construction and meaning of the drawings or specifications, and upon all such questions his decision should be final; but upon the question of extra work he was not authorized to decide. On the contrary, by the express terms of the contract, such disputes were to be referred to two competent persons, and if

they could not agree, the services of an umpire were to be invoked. Was it competent for the parties to make such a stipulation? It has been frequently decided, and now seems to be the settled law, that an agreement to refer a case to arbitration will not be regarded by the courts, and they will take jurisdiction and determine a dispute between the parties, notwithstanding such an agreement. But that is not this case. Here the parties simply agreed that the amount or value of certain extra work should be fixed in a certain manner, and was there any right of action in this case for and on account of said extra work until the value thereof was fixed according to the terms and conditions of the contract? In other words, was it not a condition precedent to any right of action, that the value of the extra work should be determined in the mode provided by the contract? This question was very elaborately considered by the Court of Appeals of New York, in the recent case of *President, etc. v. Pennsylvania Coal Company*, 50 N. Y. 250. The court there says: "The distinction between the two classes of cases is marked and well defined. In one case, the parties undertake by an independent covenant or agreement to provide for an adjustment and settlement of all disputes and differences by arbitration, to the exclusion of the courts; and in the other they merely, by the same agreement which creates the liability and gives the right, qualify the right, by providing that before any right of action shall accrue, certain facts shall be determined, or amounts and values ascertained; and this is made a condition precedent, either in terms or by necessary implication. This condition being lawful, the courts have never hesitated to give full effect to it. * * *

The reports abound in cases in which the principle has been affirmed and applied. See *Herrick v. Belknap*, 27 Vt. 673. In *United States v. Robeson*, 9 Pet. 319, it was held, that when the parties in the contract fix on a certain mode by which the amount to be paid shall be ascertained, the party that seeks the enforcement of the agreement must show that he has done everything on his part which could be done to carry it into effect; that he cannot compel the payment of the amount claimed, unless he shall procure the kind of evidence required by the contract, or show that by time or accident he is unable to do so. Judge STORY, in his work on Equity Jurisprudence, § 1457 *a*, states the rule: 'But under a contract to pay the covenantee such damages in a certain contingency as a third

person shall award, there is, in the absence of fraud, no cause of action either at law or in equity, unless the award is made.'"

Referring to the case in 50 N. Y., the Supreme Court of Wisconsin, in *Hudson v. McCartney*, 33 Wis. 345, says: "A late case in the Court of Appeals (50 N. Y. 250), to which our attention has been directed since the argument in this case, fully sustains the views above expressed as to the general principles of law governing contracts of this nature. The opinion of the court by ALLEN, J., is valuable for the discussion it contains, and the authorities it collects and reviews, and particularly so for the clear and accurate distinction which it draws between those covenants for submission and conditions which are precedent in a nature, and oust the courts of jurisdiction or bar the action of the plaintiff, and those which are not so, and as to which he may have his remedy for the recovery of damages."

This question was very ably considered in the House of Lords, in the case of *Scott v. Avery*, 5 H. L. Cas. 811. Mr. Justice COLERIDGE there says: "If two parties enter into a contract, for a breach of which in any particular an action lies, they cannot make it a binding term, that in such an event no action shall be maintainable, but that the only remedy shall be by reference to arbitration. Whether this rests on a satisfactory principle or not, may well be questioned; but it has been so long settled, that it cannot be disturbed. The courts will not enforce or sanction an agreement which deprives the subject of that recourse to their jurisdiction, which has been considered a right inalienable, even by the concurrent will of both parties. But nothing prevents parties from ascertaining and constituting as they please the cause of action which is to become the subject-matter of decision by the courts. Covenantee parties may agree, that in case of an alleged breach, the damages to be recovered shall be a sum fixed, or a sum to be ascertained by A. B., or by arbitrators to be chosen in such or such a manner; and until this be done, or the non-feasance be satisfactorily accounted for, that no action shall be maintainable for the breach." And in the same case Lord CAMPBELL said: "There is an express understanding that no action shall be brought until the arbitrators have decided, and there is abundant consideration for that in the mutual contract into which the parties have entered; therefore unless there is some illegality in the contract, the courts are bound to give it effect. There is no statute against such a con-

tract; then on what ground is it to be declared illegal? It is contended that it is contrary to public policy; that it is rather a dangerous ground to go upon; I say that, with great deference to your Lordships, after the view that was taken in a very important case lately decided in this House; but what pretense can there be for saying that there is any thing contrary to public policy in allowing parties to contract that they shall not be liable to any action until their liability has been ascertained by a domestic and private tribunal, upon which they themselves agree? Can the public be injured by it? It seems to me that it would be a most inexpedient encroachment upon the liberty of the subject if he were not allowed to enter into such a contract.

It is true, that the contract in this case does not declare that no action shall be brought until the amount of damages has been fixed; but that is the meaning and legal effect of the contract. In the case (50 N. Y.) referred to above, it is said: "When, as here, the agreement is, that the covenantor shall pay such sum, and only such sum as shall be determined by arbitrators, the procuring an award is as clearly a condition precedent to an action as if the parties had added, 'and no action can be maintainable until after the award of the arbitrators.' Such a clause would be surplusage, and its insertion a work of supererogation. Mr. Justice CROWDER, in making response to the question propounded by the Lords to the judges in *Scott v. Avery*, thus states the question and the answer to it: 'Can a ship-owner and an insurer enter into a valid agreement that the ship-owner shall pay down a given sum, and that in consideration of such payment the insurer, upon the loss of a given ship, shall pay to the said owner, not the amount of loss sustained by her through the perils of the sea, but only such sum of money as shall be settled and ascertained by arbitration? I am not aware of any legal objection to such a contract, whatever may be thought of its prudence. And I think the effect of such a contract is, that no action lies from the breach of it, until the sum has been ascertained by arbitration.' The judge lays no stress upon the form of the contract, but regards the provision for determining the amount to be paid by arbitration as in legal effect postponing the right of action until after the award is made."

In view of the foregoing authorities, and the principle they announce (which we believe to be correct), no right of action accrued to the contractor for the extra work done by him, until the same

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was valued, or some good and sufficient excuse for a failure to value the same in accordance with the agreement was shown. In this case no valuation was made, and no reason is shown for a failure to make such a valuation. We are therefore of the opinion that the contractor was not entitled to recover anything for extra work.

Judgment reversed, and cause remanded for further proceedings in accordance with this opinion.

Judgment affirmed.

ROSS, MYRICK and MCKINSTRY, JJ., concurred.

THORNTON and MCKEE, JJ., concurred in judgment.

DURKEE V. CENTRAL PACIFIC RAILROAD COMPANY.

(56 Cal. 388.)

Damages — negligence — parent and child — statutory construction.

Under a statute allowing an action to the parent of a minor child for injury by the wrong or negligence of another, and the recovery of such damages as may be just, there can be no recovery for injuries personal to the child.*

ACTION of damages for negligence. The opinion states the case. The plaintiff had judgment below.

McAllister & Bergin and S. W. Sanderson, for appellant.

A. M. Crane and John Haynes, for respondent.

MORRISON, C. J. This is an action by plaintiff to recover damages of defendant for an injury to the infant son of plaintiff, alleged to have been caused carelessly and negligently by the servants and employees of the defendant. It appears, from the evidence in the case, that on the 2d day of July, 1876, Milton W. Durkee, the son of the plaintiff, aged about five and a half years, was run over by an engine belonging to and at the time in the service of the defend-

* See *Wyman v. Leavitt* (71 Me. 227), 36 Am. Rep. 308.

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ant, and was so severely injured that amputation of both his feet became necessary. Verdict for \$10,000 damages.

It is unnecessary for us to examine into the circumstances connected with the injury, as the question of contributory negligence was fully and fairly presented to the jury for their consideration, and the fact was found that there was no contributory negligence. In our opinion, the evidence justified the jury in finding that there was negligence on the part of the railroad employees, and that there was no contributory negligence on the part of the plaintiff or his infant son.

There remains therefore but one question for this court to determine, in passing upon the appeal, and that relates to the measure of damages in cases of this character. The action is brought under §§ 376 and 377 of the Code of Civil Procedure, which read as follows :

“SEC. 376. A father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a minor child, and a guardian for the injury or death of his ward, when such injury or death is caused by the wrongful act or neglect of another. Such action may be maintained against the person causing the injury or death, or if such person be employed by another person who is responsible for his conduct, also against such other person.

“SEC. 377. When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just.”

It is the last clause of section 377 which creates the embarrassment we have felt in arriving at a correct and satisfactory conclusion in this case. The court has been unable to find a statute of any other State precisely similar to ours ; the nearest approach thereto being the statutes of Indiana, New York and Nevada. Section 27 of the 2d Revised Statutes of Indiana provides as follows: “A father, or in case of his death or desertion of his family, or imprisonment, the mother, may maintain an action for the injury or death of a child ; and a guardian for the death or injury of his

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ward. But when the action is brought by a guardian for an injury to his ward, the damages shall inure to the benefit of the ward."

In the case of *Long v. Morrison*, 14 Ind. 600, the Supreme Court says: "On the question of damages in this class of cases, the common-law rule must prevail. * * * When the action is by the husband, or master, or parent, for their individual losses respectively occasioned by the tortious acts towards the wife, infant, child, or servant, the individual suffering of the immediate subject of the wrongful act cannot be taken into account in the assignment of damages." See *Ohio, etc., Co. v. Tindall*, 13 Ind. 366.

The case last referred to was an action brought by Margaretta Tendall, mother of Daniel Tendall, deceased, a minor, against the Ohio and Mississippi Railroad Company, to recover damages for the loss of the life of said Daniel, he having been killed by an engine of said company running upon the road. The court says: "The third question relates to the damages. The court instructed the jury, that in estimating the damages, they might take into consideration the actual pecuniary loss to the plaintiff, occasioned by the death of the son and servant, and also such other circumstances as have injuriously affected the plaintiff in person, in peace of mind, and in happiness." The court proceeds to say: "This instruction was erroneous. See *Quin v. Moore*, 15 N. Y. 432."

In the case of *Quin v. Moore*, the Court of Appeals of New York uses this language: "In respect to purely personal torts, it is true, that at common law the right of action ceases with the life of the injured party; but the theory of the statute is, that the next of kin have a pecuniary interest in the life of the person killed, and the value of this interest is the amount for which the jury are to give their verdict. Neither the personal wrong or outrage to the decedent, nor the pain and suffering he may have endured, are to be taken into account. These would be the foundation of the action, and would furnish the criterion of damages if death had not ensued and the injured party had brought the suit."

The statute of New York, under which the foregoing decisions were made, authorized the jury to give such damages as they deem fair and just, with reference to the pecuniary injury resulting from such death to the wife and next of kin of the deceased person; and in the case of *Oldfield v. N. Y. & Harlem R. R. Co.*, 14 N. Y. 318, it was held, that "the jury who had all the circumstances of the casualty, and the precise condition and relationship of the parties

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before them, should give such compensation as they should deem fair and just, keeping in view that it was to be measured by the injury done to the next of kin. They were not to compensate for the pain and suffering endured by the deceased, or the anguish and mental distress of a wife or children incident to the loss of a husband or father; but were to measure the compensation by the pecuniary injury exclusively, the statute assuming that every person possesses some relative value to others." In this case, the court below instructed the jury, "that they could not give damages for the physical suffering of the child, or the anguish of mind inflicted upon the parent by such a calamity; that the measure of compensation was strictly pecuniary, to indemnify fully for any pecuniary loss that may have attended or resulted from the death of the child;" and the Court of Appeals held that the instruction was properly given. Justice COMSTOCK, in his concurring opinion, says: "In this case, if the child had been only wounded instead of killed, the action to recover the expenses incurred in its cure and for the loss of services could have been maintained only by the parent or the person entitled to the service. But the child could also sue for the personal wrong to itself."

In the case of *Penn. R. R. Co. v. Zebe*, 33 Penn. St. 328, it was said that "the measure of damage is not the loss or suffering of the deceased, but the injury resulting from his death to his family."

In the case of *Penn. R. R. Co. v. Kelly*, 7 Casey, 372, the court says: "The damages must be compensatory merely, and that compensation must have regard to the plaintiff's loss of his son's services, and to the expenses of nursing and professional treatment. The father was entitled to the services of his child during minority, and by just so much as this injury impaired the value of that right was he entitled to compensatory damages." And it was added: "That it was proper for the jury to understand that the sufferings endured by the boy, and the disfigurement of his form, and whatever was merely personal to him, should not enter into the father's damages, because for them the son would have a right of action." The law upon this subject is well stated by Sherman and Redfield in their work on Negligence, § 608. "The damages recoverable by a parent, guardian, or master, for a negligent injury to the person of his child or servant, are strictly limited to an amount fully compensatory for the consequent loss of services for a period not exceeding the minority of the child or the term of service of a servant,

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and the expenses which the plaintiff has incurred in consequence of the injury, such as for surgical attendance, nursing, and the like. * * * Damages awarded upon any other grounds than these clearly belong to the person corporally injured, whose right to sue, it must be remembered, is entirely unaffected by the action of his parent or master. If the latter should be allowed to recover for the pain and suffering of the servant (or child), it would follow, either that the servant (or child) could not recover himself for the same cause, or that the negligent person would be liable to pay twice the amount of damage which he had really done. Either alternative is contrary to justice and common sense."

We have thus seen, that under statutes more or less similar to our own, as well as according to the principles of the common law, two actions can be maintained for damages, such as are claimed in this case; one in behalf of the parent, and the other in behalf of the minor. When the action is brought by the parent, loss of service, medical attendance, expenses of nursing, and the like are matters to be considered by the jury; and in such cases compensation is the rule. It is true, that much is left to the sound discretion of the jury, as in the very nature of things no precise measure of damages can be established for any particular case; but when the action is brought on behalf of the child, there are other separate and distinct elements of damage. The child recovers, not for loss of time or service or medical attendance or expenses of curing, but for the injury personal to himself, such as pain and suffering, both physical and mental, disfigurement, etc.

This brings us to the question how far the rule above laid down is affected by the provisions of the Code of Civil Procedure. It will be observed, that section 376 provides that "the father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a minor child, and a guardian for the injury or death of his ward." Here we have two rights of action for the same cause: one in behalf of the father, and the other is given to the guardian. Is the measure of recovery the same in both? If it is, then the negligent person would be liable to pay twice the amount of damage he had really done, which, in the language of the work on Negligence referred to above, would be contrary to justice and common sense. When therefore section 377 of the Code of Civil Procedure provides, that "in every action under this and the preceding section, such damages may be given as

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under all the circumstances of the case may be just," it was not intended that the party guilty of the negligent and wrongful act should be compelled in the first place to pay the full measure of damages sustained to the father, and afterward to pay the same amount to the guardian for the use of the minor. It is therefore reasonable to presume, that the legislature had in view the principles of the common law, as the same are applicable to cases of this character, and intended that the father should recover such damages as he has sustained, by way of compensation, leaving to the infant a further right of recovery of such damages as are personal to himself.

This brings us to the charge and instructions of the learned judge to the jury in the case now under consideration. Several parts of the charge were duly excepted to by the defendant, the first of which we will notice is the following :

"The question of damages is one for your consideration ; and you may award such damages as, in view of all the circumstances — the mental capacity of the boy himself, and of the injury inflicted upon him — may seem to you just. Whatever amount of money, in your judgment, will compensate him for his injuries, that will be the amount of your verdict."

It seems to us that the foregoing portion of the charge is not in harmony with the rule of damages laid down by the authorities, and applicable to this case. The question was, not what damages would compensate him, the infant, for the injury inflicted upon him, but what damages would compensate the father for the loss incurred by him.

The refusal of the court to give the following instruction offered by the defendant is also assigned as error :

"Instruction No. 7. Plaintiff is not entitled to recover in this action damages for the pain or suffering which his son, Milton W. Durkee, experienced from the injuries he received, or for his disfigurement therefrom."

Under the authorities considered above, this instruction was proper, and should have been given.

We are of opinion, that for these errors the judgment and order of the court below should be reversed, and it is so ordered.

SHARPSTEIN and THORNTON, JJ., concurred.

MYRICK and MCKINSTRY, JJ., concurred in the judgment.

Hewitt v. Anderson.

HEWITT V. ANDERSON.

(56 Cal. 476.)

Reward — no intent to claim.

One cannot recover a reward where his acts were performed with knowledge of the offer of a reward, but without any intention of claiming it.*

ACTION for reward. The opinion states the case. The defendant had judgment below.

Paris & Allen and *H. Goodcell*, for appellant. Although the New York courts have held, that in order to entitle one to an offered reward, it is necessary that he should have acted in view of it, yet we submit that the weight of authority, as well as reason and principle, are adverse to the New York decisions, and that one who performs the necessary acts is entitled to the reward, although such acts were performed without any knowledge of the offer of reward, and without any view to obtaining it. *Auditor v. Ballard*, 9 Bush, 572; *Dawkins v. Sappington*, 26 Ind. 199; *Crawshaw v. City of Roxbury*, 7 Gray, 377; *Russell v. Stewart*, 44 Vt. 170; *Eagle v. Smith*, 4 Houst. 293; *Williams v. Carwardine*, 4 B. & Ad. 621. And see note in *Hayden v. Souger*, 56 Ind. 42; s. c., 26 Am. Rep. 6, where the authorities on this subject are collated, and where it is said: "Generally, a knowledge of the offer of the reward before the service was rendered is not essential to recovery."

John W. Satterwhite and *Byron Waters*, for respondents. Plaintiff must show that he knew reward was offered, and that he acted in reference to it, and in faith of getting it. *Howland v. Lounds*, 51 N. Y. 604; s. c., 10 Am. Rep. 655; *Burke v. Wells*, 50 Cal. 218; *Ryer v. Stockwell*, 14 id. 135; *City Bank v. Bangs*, 2 Edw. Ch. 95.

SHARPSTEIN, J. The defendant signed and caused to be published an instrument of which the following is a copy:

"We, the undersigned, promise and agree to pay the sum set opposite our names for the arrest and conviction of any person who has, within the past six months, maliciously, and with intent to

* See note, 20 Am. Rep. 6.

commit arson, burned any building in the town of San Bernardino, or who may in the future, with said intent, set fire to, attempting to burn, or shall burn, or cause to be burned, any building in the limits of said town." Opposite to the name of each of the defendants a certain amount is set, and the aggregate of those amounts is \$900, for which the plaintiff sues. The findings of the court, with one exception, are in favor of the plaintiff. That one is as follows: "That none of the acts of plaintiff were done with a view to obtaining said reward, or any part thereof, but all of said acts were done without any intention of claiming said reward, or any part thereof."

If this finding is justified by the evidence, the judgment rendered in favor of defendants cannot be disturbed. The evidence upon this point is conflicting. The plaintiff, on the trial, testified that he'd do the acts upon which he bases his claim to the reward with a view to obtaining it. On the other hand, there was evidence introduced by the defendants which tended to prove that the plaintiff had stated, under oath, that he had not expected any reward. In view of that conflict, we would not disturb a finding either way. And we are satisfied, that under that finding the plaintiff cannot recover in this action. If he did not do the acts upon which he now bases his right to recover, with the intention of claiming the reward in the event of his accomplishing what would entitle him to it, he cannot recover it. If he had not known that a reward had been offered, he might, upon the authority of some cases, recover. But we are not aware of any case in which it has been held that a party, after disclaiming any intention to claim a reward, could recover it.

Judgment and order affirmed.

MYRICK and THORNTON, JJ., concurred.

Meeks v. Southern Pacific Railroad Company.

MEEKS V. SOUTHERN PACIFIC RAILROAD COMPANY.

(56 Cal. 512.)

Negligence — infant trespasser on railway track.

An infant, six or seven years old, lying insensible or asleep on a railway track, near a highway crossing, was injured by a train. He was perceived by the fireman and engineer in time to stop, but they supposed him a bunch of leaves or weeds, until too late. No warning signal was given. His parents had forbidden him to go on the track. *Held*, that a recovery was warranted. (See note, p. 72.)

ACTION of damages for personal injury by negligence. The opinion states the facts. The plaintiff had judgment below.

Glassell, Smith & Smith, for appellant.

C. W. C. Rowell, and *Andrew B. Paris*, for respondent.

Ross, J. At the time of the injury for which this action was brought, the plaintiff, an infant of between six and seven years of age, was residing with his parents near the railroad of the defendant, and but a short distance from where a public highway crossed the railroad track. There is testimony in the record tending to show that shortly before the accident the plaintiff was at play in the yard of his parents with another boy about nine years old, the son of a Mrs. Poole. That this lady and the plaintiff's mother were in the house, when Mrs. Poole sent her son to hitch a horse — it being necessary for him to cross the railroad track in order to do so. That the plaintiff followed young Poole, and on reaching the track became dizzy, and fell down on it at a point about fifteen feet from where the highway crossed the track. That he remained there either in that condition or asleep, until shortly afterward, a construction train of the defendant came along, on an up-grade, at the rate of about eight miles an hour, and crushed one of the plaintiff's feet, necessitating amputation, and otherwise seriously injuring him. It also appears that the plaintiff had, on two or more previous occasions, fallen on the ground dizzy, and then asleep, of which circumstance his mother was aware.

When the case was last here (*Meeks v. S. P. R. R. Co.*, 52 Cal. 604), the facts, as made to appear, and on which it was held that

the plaintiff was not entitled to recover, were thus stated by the court: "The plaintiff, an infant of some six years, seems to have been permitted by his parents to make use of the roadway of the defendant as a play-ground, and to lie down on the railroad track unattended. As to whether he was asleep upon the track, or awake, there is some conflict in the evidence. But this is not material; for in either case such conduct amounted to negligence *per se*, which would defeat a recovery by the plaintiff here. It should be observed, in this connection, that there is no evidence whatever of the lack of diligence and due care upon the part of those in charge of the train. The plaintiff was lying on the track, parallel with the rails; he was discovered by the engineer and lookout at some distance ahead; but notwithstanding a continued scrutiny exercised by them, they were unable to discern that the object at which they were looking was other than a brush, or some insignificant obstruction upon the track. When they did discover that a child was lying there, they used every endeavor to slow up the train, but it was then too late to prevent the accident by any, even the utmost, effort upon their part."

The facts as made to appear in the record now before us differ from the facts then appearing, in many material respects.

As the case is now presented, it does not appear that the plaintiff was permitted by his parents to make use of the roadway of the defendant as a play-ground, or to lie down on the railroad track unattended, nor at all. On the contrary, the plaintiff's mother testified that she never allowed him to play on the track, and the plaintiff himself testified that when he went there for that purpose his mother whipped him for doing so. It appears however that the plaintiff's mother had on several previous occasions sent him down the track a short distance, to Colton, with messages; and some of the witnesses also testified, that when the road was being built, the plaintiff was in the habit of playing around there while the men were at work.

In another important respect, the facts as now made to appear differ from those presented on the former appeal. Then as observed by the court, there was "no evidence whatever of the lack of diligence and due care upon the part of those in charge of the train."

Not so however now; for there is in the record testimony on the part of the plaintiff tending to show that at the place the injury

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occurred, and for a considerable distance beyond, the road of the defendant was perfectly straight, and free from weeds and other like obstructions; that the day was very clear, and that at the time of the injury the plaintiff could have been seen and and recognized as a boy on the track at a distance of from three hundred to three hundred and fifty yards. This testimony undoubtedly tends to show negligence on the part of the employees of the defendant. But it is greatly strengthened by the testimony of some of the defendant's witnesses. It appears from their testimony that there were on the engine at the time of the injury three persons—Jackson, the engineer; Holmes, the conductor, and a fireman. The engineer had control of the engine, and it was his duty to keep a lookout. Yet Holmes testified that he himself saw the plaintiff at a distance of four or five hundred feet ahead, but supposed he was a bunch of leaves or weeds, or some other insignificant object, until they got within about one hundred and fifty feet of the plaintiff, when he discovered he was a child, and then called out to the engineer, "murder"; and that up to the time that he, Holmes, called out "murder," the engineer had made no demonstration that there was any thing on the track. The testimony also tended to show that the whistle was not blown nor the bell rung, although the plaintiff lay within a few feet of where a public highway crossed the railroad track. We think the evidence amply sufficient to justify the finding of negligence on the part of the employees of the defendant.

The question remains, does the case show such contributory negligence on the part of the plaintiff or his parents as will preclude a recovery by him?

In our opinion, the doctrine of the cases of *Needham v. S. F. & S. J. R. R. Co.*, 37 Cal. 409; *Kline v. C. P. R. R. Co.*, id. 400, and the other cases in this court approving them, determines the question in the negative. Said the court in *Needham v. S. F. & S. J. R. R. Co.*: "No more in law than in morals can one wrong be justified or excused by another.

"A wrong-doer is not an outlaw, against whom every man may lift his hand. Neither his life, limbs, nor property are held at the mercy of his adversary. On the contrary, the latter is bound to conduct himself with reasonable care and prudence, notwithstanding the fault of the former; and if by so doing he can avoid injuring the person or property of the former, he is liable if he does not, if

by reason thereof injury ensues." Referring to the rule adopted in New York, the court proceeds: "The error of the New York courts lies in the fact, that they ignore all distinction between cases where the negligence of the plaintiff is proximate, and where it is remote, and in not limiting the rule, which they announce, to the former." The court then quotes approvingly from the opinion of the Supreme Court of Connecticut, in the case of *Isbell v. New York & New Haven R. R. Co.*, 27 Conn. 404, language which we think appropriate to the case under consideration. Said the court there: "A remote fault in one party does not of course dispense with care in the other. It may even make it more necessary and important, if thereby a calamitous injury can be avoided, or an unavoidable calamity essentially mitigated. Common justice and common humanity demand this, and it is no answer for the neglect of it to say that the complainant was first in the wrong, since inattention and accidents are to a greater or less extent incident to human affairs. Preventive remedies must therefore always be proportioned to the case in its peculiar circumstances—to the imminency of the danger, the evil to be avoided, and the means at hand of avoiding it. And herein is no novel or strange doctrine of the law; it is as old as the moral law itself, and is laid down in the earliest books on jurisprudence. A boy enters a door-yard to find his ball or arrow, or to look at a flower in the garden; he is bitten and lacerated by a vicious bull-dog; still, he is a trespasser, and if he had kept away would have received no hurt. Nevertheless, is not the owner of the dog liable? A person is hunting in the woods of a stranger, or crossing a pasture of his neighbor, and is wounded by a concealed gun, or his dog is killed by some concealed instrument, or he is himself gored by an enraged bull; is he in all these cases remediless because he is there without consent? Or an intoxicated man is lying in the traveled part of the highway, helpless, if not unconscious: must I not use care to avoid him? May I say that he has no right to incumber the highway, and therefore carelessly continue my progress, regardless of consequences? Or if such a man has taken refuge in a field of grass or a hedge of bushes, may the owner of a field, knowing the fact, continue to mow on or fell trees, as if it was not so? Or, if the intoxicated man has entered a private lane or by-way, and will be run over if the owner does not stop his team which is passing through it, must he not stop them? These are instances. I am aware, of personal rights; but what is

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true in relation to the person is essentially true in relation to dumb animals and other kinds of property, though perhaps the rule would be applied in the latter case with less strictness. It must be so, that an unnecessary injury negligently inflicted in these and kindred cases is wrong, and therefore unlawful."

Kline v. C. P. R. R. Co., *supra*, was an action to recover damages for personal injuries sustained by the plaintiff by reason of his having been, as alleged, wrongfully expelled from the cars of defendant by the conductor, while the cars were in motion. The court there said: "Although the plaintiff was wrongfully upon the cars, the conductor was bound to exercise reasonable care and prudence in removing him. The rule that the plaintiff cannot recover if his own wrong, as well as that of the defendant, has conduced to the injury which he has sustained, is confined to cases where his wrong or negligence has immediately or proximately contributed to the result. We had occasion to consider this question in the case of *Needham v. San Francisco & San Jose Railroad Company*, *supra*, and we there reached the conclusion just stated. If the plaintiff be in the wrong, yet if his wrong or negligence is remote—that is, does not immediately accompany the transaction from which his injury resulted—the defendant cannot excuse himself on the score of mutuality, nor absolve himself from his obligation to exercise reasonable care and prudence in what he may do. In getting upon the train while it was going at a speed of ten miles an hour, the plaintiff was negligent, even though he attempted to do so as a passenger, with the intention to pay a fare; and if he had failed in achieving a safe landing, and had fallen in the attempt, no blame or liability could have been charged to the account of the defendant. If, as was doubtless the case, he got upon the car, as boys sometimes will, with intent to enjoy the stolen pleasure of a free ride to Front street, he came as a trespasser, and doubtless the defendant, acting contemporaneously, could have legally prevented him from getting on the car, by the use of such force as may have been requisite, without becoming legally responsible, or morally to blame, for any injury which he might have sustained. And if he succeeded in getting upon the car without opposition, the defendant doubtless had the right to eject him by force, if force was necessary; but it was bound to exercise the right with ordinary care and prudence, and it had no right to eject him under circumstances which would endanger his personal safety. If the train was going

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at a speed which would render it unsafe for him to leave the car, it was the duty of the defendant, if determined to put him off, to stop or 'slow up' sufficiently to allow him to descend in safety, by the exercise of reasonable care and prudence on his part. Although his entry upon the car was a trespass, yet if it was an accomplished fact before the conductor attempted to interfere, his entry did not directly conduce to the injury which he sustained, but was, in the sense of the rule under consideration, only its remote cause, and did not therefore absolve the conductor from the duty of observing reasonable care and prudence in putting him off the train.

In our opinion, an application of the principles announced in these cases to the facts of the case before us, renders the defendant liable for the injuries sustained by the plaintiff. The instructions of the court below were in accordance with these views, and the judgment and order are therefore affirmed.

Judgment affirmed.

McKINSTRY and McKEE, JJ., concurred in the judgment.

NOTE BY THE REPORTER.— See *Houston, etc., R. Co. v. Symptkins*, post.

In *Isabel v. Hannibal & St. Joseph R. Co.*, 91 Mo. 473, the court said: "The sixth instruction is liable to some criticism, and is not as definite as it should be. It declares that if those in charge of defendant's train, by the exercise of ordinary skill and caution might have observed the child upon the railroad track and recognized him as an infant, in time to stop the train before it reached and ran over him, then the verdict should be for the plaintiff.

"As an abstract proposition of law, this declaration in all cases might not be strictly correct. It might seem to cast upon the company a greater degree of diligence than is in all instances required; but when examined in the light of the evidence we think the objection disappears. The track is private property, and except in the case of crossing highways, persons have no right to be on it. The company is entitled to a clear track, and it is not to be presumed that persons will be on it when they have no right to be there. The same diligence will not be necessary in running trains through the country that would be required in the streets of a town or the crossing of a public highway.

"In order to make a defendant liable for an injury where the plaintiff has also been negligent or in fault, it should appear that the proximate cause of the injury was the omission of the defendant, after becoming aware of the danger to which the plaintiff was exposed, to use a proper degree of care to avoid injuring him.

"Diligence and negligence are relative terms and depend on varying circumstances. An act may be negligent at a particular place, which would not be so at another place, and under different circumstances.

"Moreover, it is clearly shown that the engineer and fireman discovered the infant, and had abundance of time to have stopped the train and saved its life; but they debated as to what it really was, till it was too late. Might they not, by a close scrutiny, and a proper observance, which it was their duty to give when they discovered an object on the track, have discovered that it was a child? The testimony is conclusive, that the child was dressed in red and this would have very easily distinguished it from a hog or a dog. The instruction, if it was intended to convey the idea that the employees, by using ordinary skill and caution after they observed the object on the track, could have distinguished that it was a child, was entirely proper. It was surely susceptible of this construction; and we are not justified in supposing that it was given with any other intent, or that it was differ-

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ently interpreted by the jury. When the facts of the case are applied to it, this conclusion follows.

"The case presented then, is, that the persons running the train saw something on the track in time to avoid collision or injury; and if after they observed it, they could by the exercise of that care and caution which the law imposes upon them have perceived that it was a child, in time to stop the train, and they were negligent, the company is liable."

PEOPLE V. RAMIREZ.

(66 Cal. 533.)

Criminal law—indictment—prosecuting witness interpreter to grand jury.

A prosecuting witness may act as interpreter of other witnesses before the grand jury.

CONVICTION of murder. The opinion states the point.

H. M. Willis and J. G. Howard, for appellant

Attorney-General, for respondent.

McKEE, J. The defendant was indicted for murder. On his arraignment, his counsel made a motion to set aside the indictment upon the ground that one Celis, who was a deputy sheriff and had arrested the defendant, and was also a witness against him, had acted as interpreter in the examination of witnesses against him before the grand jury, and was present at the examination of such witnesses by the grand jury. The motion was denied, and the ruling is assigned as error.

1. The presence of the interpreter before the grand jury was necessary, and the law allowed it. Stats. 1871-72, p. 540. But it is contended, that one who was the prosecuting witness against the defendant could not legally act as interpreter against him. We know of no reason why a person who is a witness in a case should be disqualified from acting as interpreter at the examination of other witnesses in the case. It must be presumed, that the grand jury or district attorney, in acting under the statute, summoned a fit and proper person as interpreter. The fact that the person summoned was a witness in the case, or had arrested the defendant, was

immaterial. Doubtless there were extrinsic reasons which influenced the grand jury in summoning the particular interpreter. It may have been that he was the only one whose services were available, and that but for him it would have been necessary to postpone the examination of witnesses, to their inconvenience, the public detriment, and the delay of justice. At all events, the selection of an interpreter depends so much upon circumstances, including the necessities of the case in which the services of one may be required, and of which those who require them are most competent to judge, that a court should not interfere with the action of those who make the selection, unless it appears there has been a gross abuse of discretion, or that injustice has been done to the defendant. No such showing was made on the motion, and the motion was properly denied.

[Omitting other matters.]

Judgment affirmed.

McKINSTRY and ROSS, JJ., concurred.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

WALSH V. LENNON.

(36 Ill. 27.)

Partnership — power of partner to bind, by sealed note.

One partner may bind the partnership by a sealed note, executed in the firm name, for a loan of money for the partnership business, so far at least as to warrant a recovery under the common counts, by bringing in the instrument to be cancelled.*

ACTION on a sealed note. The opinion states the case. The plaintiff had judgment below.

Geo. S. House, for appellant.

Hill & Dibble, for appellee, cited *Orn v. Chase*, 1 Meriv. 729; *McCullough v. Summerville*, 8 Leigh, 415; *Purviance v. Sutherland*, 2 Ohio St. 478; *Despatch Line v. Belamy Mfg. Co.*, 12 N. H. 206; *Evans v. Wells*, 22 Wend. 324; *Lucas v. Bank of Darien*, 2 Stew. 297; *Price v. Alexander & Co.*, 2 Greene, 433; *Tapley v. Butter-*

* To same effect, *Schmertz v. Shreve* (69 Penn. St. 457), 1 Am. Rep. 439.

field, 1 Metc. 515; *Milton v. Mosher*, 7 id. 248; *Wood v. A. & R. R. Co.*, 4 Seld. 167; *Fagely v. Bellas*, 17 Penn. St. 67; *Robinson v. Crowder*, 4 McCord, 519; *Crozier v. Carr*, 11 Tex. 376; *Mitchell v. St. Andrews Bay Land Co.*, 4 Fla. 200; *Sweetzer v. Mead*, 5 Mich. 110; *Human v. Cuniffe*, 32 Mo. 318; *Lawrence v. Taylor*, 5 Hill, 107; *Damon v. Cranby*, 2 Pick. 352; *Everett v. Strong*, 5 Hill, 163; *Dubois' Appeal*, 38 Penn. St. 231; *Gibson v. Warden*, 14 Wall. 247; *Ex parte Bosanquit*, 1 De Gex, 439; 2 Pars. Part-191; *Story Agency*, § 19; 1 Am. Lead. Cases, 554; *Trewett v. Wainwright*, 4 Gilm. 411.

DICKEY, C. J. This is an action of *assumpsit*, brought by Lennon, against Robert Walsh and Thomas Walsh, as partners, doing business under the firm name of "Walsh Bros.," upon an instrument in writing, dated Joliet, Ill., May 27, 1875, and purporting, on its face, to be signed and sealed by Walsh Bros. and by Thomas Walsh, by which they promised, jointly and severally, for value received, to pay to the order of Lennon \$980, one day after date, with interest at ten per cent per annum after due, in which instrument it was recited that the same was given for money loaned. The instrument also contained a power of attorney authorizing a judgment by confession to be entered at any time for the amount then due thereon.

Defendants were served with process. Thomas Walsh suffered judgment by default. Robert Walsh made defense, upon the sole ground that he did not seal the instrument in question. The declaration contained special counts upon the instrument, and also the common money counts.

On the trial, it was proven that Thomas Walsh and Robert Walsh were partners, doing business as dealers in dry goods, under the firm name, "Walsh Bros." and that Thomas Walsh signed the firm name to the writing in question. It is authenticated thus:

"Witness our hand and seals.

WALSH BROS., [SEAL]
 THOMAS WALSH. [SEAL]
 [SEAL]"

The plaintiff recovered, and Robert Walsh appeals to this court.

It is insisted that the instrument, being a sealed instrument, is not such an instrument as one partner may execute for another.

It is well settled that the power of a partner does not enable him, merely as such, to bind the other members of the firm by deed. It is, however, among the powers of a partner in such business, to borrow money in the name of the firm, and thus render his partners liable for the sum borrowed; and to bind the firm by an agreement to pay interest on the same at any lawful rate, and to sign the firm name to any writing admitting the fact of the borrowing, and promising to pay, and thereby to furnish evidence against the firm and each of its members. All this Thomas Walsh did do, and thereby (as a majority of the court think), did bind the firm and each of its members. He also added a seal to the signature. This he had no authority to do, in behalf of his firm or of his partner. This seal added nothing to the force and effect of the writing to which the firm name was signed, and a majority of the court are of opinion that the addition of a seal to the firm name did not impair or vitiate the written acknowledgment of the firm, and the written promise of the firm contained in the paper, and sanctioned by the firm name placed there by one of the partners.

It is undoubtedly true, that one partner has no power to bind the firm by deed,—but this instrument is not sued upon as a deed. The declaration contains the common counts. The proof shows defendants were partners, and that the writing in question has the firm name attached thereto by one of the partners. This partner had the right to borrow money on the credit of the firm and give the promise of the firm for its payment. A seal is not necessary to render such a promise effective. The writing, without reference to its effect as an obligation, contains a written admission that the money was borrowed by the firm at the agreed rate of interest mentioned. Had the partner written a letter to a third party and stated these facts in the letter, can any one doubt that such a letter, signed by one of the partners, would be competent evidence to prove these facts? And can it be contended that the adding of a seal to the letter would have impaired the force of such evidence? *Purviance v. Sutherland*, 2 Ohio St. 478. The giving of a note for a debt, whether sealed or unsealed, does not pay or discharge the debt, unless it be agreed that it shall be accepted as payment and satisfaction, and *assumpsit* may be maintained for the debt, if the note be produced on the trial to be cancelled. One partner, acting for the firm, may in its name, appoint an agent and authorize him to bind the firm by his contracts, made in the name of the firm by

him, as such agent. Such authority may be given in writing, and such writing need not be under seal; and if a seal be added it will not vitiate the effect of the writing. *Lucas v. Bank*, 2 Stew. 297.

There are many respectable authorities to the position, that while one partner cannot bind his copartners by deed, yet if the instrument used in commercial transactions be valid and effective without a seal, and within the power of a partner, the attempt to seal the same in behalf of the firm will not vitiate its legal effect as an unsealed instrument. See *Pars. on Part.* (2d. ed.), p. 191, note m, and *Price v. Alexander*, 2 Greene, 427; *Lawrence v. Taylor*, 5 Hill, 107; *Sweetzer v. Mead*, 5 Mich. 107; *Tapley v. Butterfield*, 1 Metc. 575; *Gibson v. Warden*, 14 Wall. 247; and authorities collated in 9 Am. Law Reg. (N. S.) 271-2.

Whatever may be the true rule on this question, a majority of the court are clear that the plaintiff had a right to recover under the common counts, by bringing in the paper to be cancelled. The proof shows the partnership from which springs the power of one partner to borrow money for the firm, and to promise, in behalf of the firm, to pay the principal at a given time, and the interest at any given, lawful rate. The writing, proved to have been signed by one of the firm, without reference to its effect as an obligation, contains an admission made by one of the partners, that the money was borrowed by the firm at the rate of interest mentioned.

The judgment must be affirmed.

Judgment affirmed.

SCHOLFIELD and MULKEY, JJ., dissenting.

OLIN V. BATE.

(98 Ill. 53.)

Contract — name — injunction to restrain use of assumed.

Defendant Bate was a physician in Chicago, giving special attention to venereal diseases, and advertising largely, conducting this business under the assumed name of Andrew G. Olin. Plaintiff, Henry Olin, was a physician, who subsequently settled in Chicago, giving special attention to diseases of the eye and ear, and becoming a member of the faculty of Burnett Medical College. In consideration of admission to the medical college, and assistance

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by plaintiff in graduating and granting him a diploma, defendant agreed to discontinue the use of the name of Olin, but failed to do so. Plaintiff filed a bill to restrain the defendant's use of the name, alleging that it injured the plaintiff's reputation. *Held*, that the bill must be dismissed. (*See note*, p. 81.)

SUIT for injunction. The opinion states the case. The bill was dismissed below.

William H. King, and *Frederick W. Packard*, for appellant.

Osgood & Riggle, and *Frank Baker*, for appellee.

SCOTT, J. Without any discussion of the legal questions raised, but assuming the law to be as complainant insists it is, the facts proven make no case warranting equitable relief against either defendant under the bill exhibited against them. The bill was brought by Henry Olin to restrain John Bate and Edward Osborne from using the name or title of complainant, or any name so like it as might mislead the public, to his prejudice. Complainant is a physician, and has practiced his profession for many years, but gives particular attention to diseases of the ear and eye. His office is in the city of Chicago, where he has practiced since 1870. It is alleged defendants are physicians, and are what are known as specialists giving attention to chronic and sexual diseases of men and women; that they advertise their business in the newspapers, and that they have published pamphlets, or books, that tend to corrupt public morality. It is also charged, the business conducted by defendants is disreputable; and because it is understood and believed by many people in Chicago and elsewhere that complainant is the "Dr. Olin" mentioned in the advertisements and books published by defendants, he insists his professional reputation is impaired and blemished, and that he is, by the acts and doings of defendants, under the name of "Dr. Olin," brought into disrepute as a physician. An amendment to the bill, made by leave of court, sets forth that in 1875, defendant Bate applied for admission, as a student, to "Burnett Medical College," of which institution complainant at the time was a member of the faculty; and that defendant, in consideration complainant would consent to his admission, agreed to abandon the fictitious name of Olin, and engage only thereafter in a reputable business. On the understanding and agreement alleged, complainant assisted in the graduation and

granting to Bate a diploma, which it is alleged, he could not have obtained without the consent of complainant. Answers were filed by both defendants, and on hearing in the Superior Court, the bill was dismissed for want of equity. That decree was affirmed in the appellate court, and complainant brings the case to this court on appeal.

No importance need be attached to the agreement set forth in the amended bill, that defendants would abandon the use of the fictitious name of "Olin," if complainant would consent to the admission of Bate to the medical college, and would assist in the graduation and granting to him a diploma, for the reason, a contract of the nature of the one insisted upon is of such doubtful propriety that equity will not lend its aid to enforce it. The granting of diplomas to students in colleges ought not to be made the subject of private contracts with individual members of the faculty for personal advantage to themselves. They should only be granted on account of the moral standing of the students, and on account of their proficiency in the studies taught in such institutions.

There can be no pretense that defendant Osborne ever assumed the name of "Olin." The utmost he did was to assist Bate in his professional duties, and that he did in his own name. Nor is there any proof that Bate ever assumed the full name of complainant. The proof shows that before he came to Chicago to reside he assumed the name of Andrew G. Olin, and since then has been known as "Andrew G. Olin," "A. G. Olin" and "Dr. Olin," in his profession. But that is not complainant's name, and never was. His name is "Henry Olin." Defendant has never advertised himself as "Henry Olin," and, so far as this record discloses, never represented to any that he was "Henry Olin." Their professions are totally distinct as to the diseases they profess to treat. Persons desiring treatment for diseases each professes to cure would not be likely to call upon one for the other, unless grossly careless. Such mistakes would be of rare occurrence, and it would be absurd to say that the few that might occur would amount to "irreparable injury" to either party. Whether the business defendants are pursuing is disreputable or not, cannot be made the ground of equitable relief in favor of complainant. Offenses against public morality, where any exist, can be more appropriately redressed in the name of the people, against the body of whom the offense is.

Complainant complains that he is subjected to embarrassment,

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and perhaps disgrace, on account of the conduct of defendants, assuming a name nearly like his own. Should that fact be conceded, but which does not appear in any proof, he has elected of his own volition to expose himself to it. Bate had assumed the name under which he chose to transact his professional business and located in Chicago long before complainant came there to reside. No equitable considerations therefore arise in favor of complainant, for whatever embarrassments to which he may be subjected, if any, come to him from his own selection of a location in which to practice his own profession.

The judgment of the appellate court will be affirmed.

Judgment affirmed.

DICKEY, C. J., dissented.

NOTE BY THE REPORTER.—This case is peculiar in several particulars: First, in the use of an assumed family name; second, in the fact that such assumption was made at a time and place when it could not have been intended to injure and could not have injured the true bearer of the name; third, in the fact that such use was in a distinct branch of business from that which the complainant pursued; fourth, in the fact that any collision must have arisen from the complainant's putting himself in its way; fifth, in the contract, *contra bonos mores*, to discontinue the use of the name. It is believed that the case is *sui generis*.

In *Burgess v. Burgess*, 3 DeG., M. & G., 896, Lord Justice TURNER said: "Where a person is selling goods under a particular name, and another person, not having that name, is using it, it may be presumed that he so uses it to represent the goods sold by himself as the goods of the person whose name he uses; but where the defendant sells goods under his own name, and it happens that the plaintiff has the same name, it does not follow that the defendant is selling his goods as the goods of the plaintiff. It is a question of evidence in each case whether there is false representation or not."

Where there is a resemblance but not absolute identity of names, "in every case the court must ascertain whether the differences are made *bona fide* in order to distinguish the one article from the other, whether the resemblances and the differences are such as naturally arise from the necessity of the case, or whether, on the other hand, the differences are simply colorable, and the resemblances are such as are obviously intended to deceive the purchaser of the one article into the belief of its being the manufacture of another person. Resemblance is a circumstance which it is of primary importance for the court to consider, because if the court finds, as it almost invariably does find in such cases as this, that there is no reason for the resemblance, except for the purpose of misleading, it will infer that the resemblance is adopted for the purpose of misleading." *Taylor v. Taylor*, L. R., 2 Eq. 890.

So, an injunction was granted in *Rodgers v. Nowell* (5 C. B. 109; 6 Hare, 826) — "Rodgers' cutlery" — to restrain the use of a name which the defendants claimed as their own firm name, a jury having found that they had acted with the intention and result of deception; and a defendant, who afterward committed a breach of the injunction, was ordered to be committed unless he adopted a mark approved by the court within a week. 3 DeG. M. & G. 611. So, in *Holloway v. Holloway* (18 Beav. 809) — "Holloway's pills" — Lord LANGDALE restrained the defendant from using his name upon pills and ointment so as to cause them to be mistaken for the plaintiff's, his brother's, pills and ointment, and his lordship observed — "The defendant's name being Holloway, he has a right to constitute himself a vendor of Holloway's pills and ointment, and I do not intend to say any thing tending to abridge any such right. But he has no right to do so with such additions to his own name as to deceive the public, and make them believe that he is selling the plaintiff's pills and

ointment." So, in *Taylor v. Taylor*,—"Taylor's thread"; *Clark v. Clark*, (25 Barb. 70) —"Clark's thread"—the injunction being limited to such user of the name as should be calculated to produce deception; *Stonebraker v. Stonebraker* (33 Md. 252) —"Stonebraker's medicines"; *James v. James* (L. R. 13 Eq. 421) —"James' horse-blisters"—where the defendant was restrained from signing his name "Robert James," and compelled to use his full name, Robert Joseph James, "Robert James," having been the name of the original inventor of the article under whom the plaintiffs claimed; *Holmes, Booth & Hayden v. Holmes, Booth, & Atwood Manufacturing Company* (37 Conn. 278; 9 Am. Rep. 334), where the two leading members of the plaintiffs' firm had left it and used their name again in the formation of a rival concern; and in *Gouraud v. Trust* (10 N. Y. Sup. Ct. 637), the defendants were restrained from making use of a name which their father had assumed (they not having themselves changed their original name), in such a way as to profit by the reputation which the father had acquired under his new name. Moreover, the fraudulent use of a man's own name has been held to render the person using it criminally responsible for obtaining money by false pretenses. *R. v. Dundas*, 6 Cox. 380—"Everett's blacking".

On the other hand, the court has refused to restrain persons from the use of their own names in *Burgess v. Burgess* (3 De G. M. & G. 896) —"Burgess' anchovy sauce"; *Comstock v. White* (18 How. Pr. 421) —"A. J. White & Co.'s pills"; *Ainsworth v. Walmsey* (L. R. 1 Eq. 518) —"Ainsworth's thread"; *Faber v. Faber* (49 Barb. 337) —"Faber's lead pencils"; *Meneely v. Meneely* (62 N. Y. 497; s. c. 30 Am. Rep. 499) —"Meneely's bells"; *Decker v. Decker* (52 How. Pr. 218) —"Decker pianos"; *Gillman v. Hunnewell* (122 Mass. 139) —"Hunnewell's medicine"; *Prince Metallic Paint Company v. Carbon Metallic Paint Company* (N. Y. Sup. Ct. 1877) —"Prince's paint"; in *Marshall v. Pinkham* (Wis. Sup. Ct., 52 Wis. 572),—"Old Dr. S. Marshall's Celebrated Liniment"; and in *Dence v. Mason* (Jan. 25, 1877), Vice-Chancellor MALINS held that, during the continuance of a partnership between two persons named Mason and Brand, it was impossible to prohibit the use of the latter's name in the business, which was carried on as "Mason and Brand," but that after he had quitted the firm, the remaining partner had not the right to use his, Brand's name, so as to deceive. And see *McLean v. Fleming* (96 U. S. 246), and *Binniger v. Wattles* (28 How. Pr. 206). See also *Shaver v. Shaver*, 54 Iowa, 208; s. c., 37 Am. Rep. 194.

The *Solicitor's Journal* says on the point of contract not to use a family name: "The question is, of course, much simplified when the defendant has contracted not to use the name, and the injunction will be granted with much less difficulty, as in *Ainsworth v. Bentley* (14 W. R. 630), where the defendant had covenanted not to publish another periodical of like nature with *Bentley's Miscellany*, which he had sold, and then published a new magazine with his name on the cover, and *Gillis v. Hall* (7 Phila. 422), where a person who had sold his interest in the firm of 'R. P. Hall & Co.,' and in a secret preparation known as 'Hall's Vegetable Sicilian Hair Renewer,' covenanting not to use his name in a similar business, began to do so, and was restrained by injunction, which he afterward disregarded, and was thereupon attached for contempt (8 Phila. 231). It is not, indeed, necessary that there should be an express covenant not to use the name when a business is being sold with the goodwill, for when you are parting with a goodwill of a business you mean to part with all that good disposition which customers entertain toward the house of business identified by the particular name or firm, which may induce them to continue giving their custom to it, as was said by Lord HATHERLY in *Churton v. Douglas* (7 W. R. 365, Johns. 174), (and see *Lery v. Walker*, L. R., 10 Ch. D. 433). In *Churton v. Douglas*, the principal partner in the firm of "John Douglas & Co., sold his interest in the business and goodwill to his partners, and then set up in the neighborhood as 'John Douglas & Co.' In other ways, also, he represented himself to be carrying on the old business, and an injunction was granted to restrain him from so doing. It will be observed that the fact that the defendant added '& Co.' after his own name in commencing his new business weighed heavily against him as evidence of fraudulent intention, and the unnecessary adoption of these words will always form an element in the case adverse to the defendant's assertion of *bona fides*. In *Fullwood v. Fullwood* (1) (W. N. 1573, pp. 93, 151), where an injunction was granted, this addition had been made to the name; so in *Fullwood v. Fullwood* (2) (26 W. R. 435, L. R., 9 Ch. D. 176); and in *Derlin v. Derlin* (69 N. Y.

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12: s c., 25 Am. Rep. 173). In *Bond v. Milbourn* (20 W. R. 197) no relief appears to have been prayed in this respect, and in *Comstock v. White* (18 How. Pr. 421) there were several defendants trading as 'A. J. White & Co.,' and as one of them was named A. J. White, the name of the firm was not interfered with."

See note, 33 Am. Rep. 335; *Marshall v. Pinkham*, post.

COLE V. MARPLE.

(98 Ill. 58.)

Insurance — wife's right as assignee of, on husband's life — statutory construction.

Under a statute permitting a wife to insure her husband's life for her benefit and hold the proceeds as against his creditors, less premiums, with interest, paid by him within the statutory period of limitation with intent to defraud creditors, she may in like manner hold the proceeds of a policy which the husband has procured on his own life and assigned to her, when insolvent.

CREDITOR'S bill to reach proceeds of life insurance. The opinion states the case. The plaintiff had judgment below.

Rosenthal & Pence, for plaintiff in error.

Higgins, Furber & Cothran, for defendant in error.

George Burry, for defendant Marple.

CRAIG, J. This was a creditor's bill, brought by Christian S. Marple against Julia T. Cole, widow of Jerah D. Cole, deceased, the Equitable Life Assurance Society, and George A. Seaverns, executor of the estate of J. D. Cole, deceased, to reach the proceeds of a \$10,000 life insurance policy, which was issued to Cole on his life by the Equitable Society, and by him assigned to Julia T. Cole, his wife, a short time before his death. The policy was issued July 17, 1868, payable in twenty years, or, in case of prior death, sixty days after notice; the premiums were to be paid in twenty annual installments of \$501.10. Cole paid the premiums as they became due, and died August 31, 1876. Before his death, and on the 30th day of August, he assigned the policy to his wife, and immediately gave notice of the assignment to the society, and the society consented to the assignment.

The estate of Cole is insolvent, and this bill was brought by a creditor, who had probated his claim against the estate. The court, on the hearing, found that the assignment of the policy from Cole to his wife was fraudulent as against complainant and the other creditors of Cole, and rendered a decree that Julia T. Cole pay into court the full amount received on the policy from the Equitable Society, to wit: \$10,633,22, with interest at six per cent from the 6th day of November, 1868, the time when she received the money.

The proposition is not controverted that a voluntary conveyance of property by a person who is insolvent is voidable, and may be set aside by creditors. But while this may be regarded as a general rule, which may be invoked by a creditor when his debtor has attempted to transfer his property beyond the reach of legal process, yet the question presented by this record is, whether the assignment of the policy made by Cole to his wife is to be regarded as falling within that general rule, or is it a transaction which is authorized by the statute.

Section 54, chapter 73, Revised Statutes 1874, page 607, which was enacted in 1869, declares: "It shall be lawful for any married woman, by herself and in her own name, or in the name of any third person, with his assent as her trustee, to cause to be insured, for her sole use, the life of her husband for any definite period, or for the term of his natural life, and in case of her surviving such period or term, the sum or net amount of the insurance becoming due and payable by the terms of the insurance, shall be payable to her, to and for her own use, free from the claims of the representatives of the husband, or of any of his creditors; Provided, however, that if the premium of such policy is paid by any person with intent to defraud his creditors, an amount equal to the premium so paid, with interest thereon, shall inure to the benefit of said creditors, subject however to the Statute of Limitations. The amount of the insurance may be made payable, in case of the death of the wife before the period at which it becomes due, to his, her or their children, for their use, as shall be provided in the policy of insurance, and their guardian, if under age."

Here is a statute which empowers a wife, in her own name, or in the name of a third party, to obtain a policy of insurance on the life of her husband, and in case of his death, the amount of the insurance shall go to the wife free from the claims of the husband's

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creditors. There is but one saving provision in the statute in favor of creditors, and that is where a person pays the premium on the policy with the intent to defraud his creditors, an amount equal to the premium so paid, and not barred by the Statute of Limitations, may be recovered. The defendant in the bill, in her answer, alleges that she caused the life of Jerah D. Cole to be insured in the Equitable Society, and that the insurance was for her sole use. She denies the right of complainant to any portion of the money paid her by the insurance society, and sets up the Statute of Limitations as a bar to the recovery of an amount equal to the premium paid by her husband on the policy prior to July 17, 1874. The question here, is, not whether defendant falls within the letter of the statute, but it is whether she substantially complied with the act and falls within its spirit.

Equity, as a general rule, disregards the form, but looks to the substance of a transaction. The Constitution of 1870 declares that "the General Assembly shall pass liberal homestead and exemption laws." Prior however to the adoption of the Constitution, in *Deere v. Chapman*, 25 Ill. 610, it was held that the homestead act was a remedial act, and should receive a liberal construction. It was there said: "Though this act may be said to be in derogation of the common law, and an innovation upon all former relations between creditors and debtors, giving to the latter new rights and immunities, yet it does not follow that it should not receive a construction so liberal as to advance the object contemplated by the legislature in passing the act." In *Good v. Fogg*, 61 Ill. 451, where the acts of 1843 and 1861, exempting certain personal property from levy and sale, came before the court for construction, it was held that a person entitled to the benefit of the exemptions may hold under both statutes a house worth not exceeding \$160; that the acts are not to receive a strict construction, and that according to their spirit, a person thus situated may in his claim unite both laws. Now, while the act which allows the wife to hold a policy of insurance on the life of her husband, and protects her in the proceeds of the policy as against the creditors of her husband, is not strictly an exemption law, yet it is of that nature, and should be construed with the same liberality.

But we are not without authority on this question. In *Charter Oak Life Ins. Co. v. Brant*, 47 Mo. 419; s. c., 4 Am. Rep. 328, where a statute similar to our own was under consideration, it is

said: "The statute was founded on charity, and intended to subserve a beneficent object, and in a case falling within it, I should be disposed to give it the most favorable construction to carry out its humane principle."

Do the facts presented by this record establish a case within the spirit of the statute? Cole held a policy payable to him, his executors, administrators and assigns. He assigned the policy to defendant, his wife. On the same day the insurance company was notified of the assignment. It accepted the notice and consented to the assignment. In *City Fire Ins Co. v. Mark*, 45 Ill. 482, where a policy had been taken out in the name of Morris, on a stock of goods, who subsequently sold the goods to Myers, and with the consent of the company, assigned to him the policy, it was held, in substance, though not in form, a new insurance was granted to Myers.

In *Burroughs v. State Mut. Life Assur. Co.*, 97 Mass. 359, where a policy was payable to the insured and his assigns, and duly assigned with the consent of the company, it was held that the assignment transferred the legal title to the assignee with right to sue in his own name.

Whether under the assignment, in this case, a suit might have been maintained in the name of Mrs. Cole, is a question which does not properly arise, and it will not be necessary to determine it. But, when the assignment was made with the consent of the company, as was held in the *Meeks* case, in substance and effect a new insurance was granted to Mrs. Cole. After the assignment was made, and assented to by the company, it could not be repudiated by Cole or the company, but under the assignment the policy was held by Mrs. Cole for her sole use and benefit; although the transaction may not have assumed the literal form required by the statute, yet the substantial requirements of the statute were followed, and under a statute of this character, that is all that can be required. At the time the assignment was made, had Mrs. Cole taken out a new policy on her husband's life, in her name, or that of a trustee, it is not denied that she would have been able to hold the proceeds regardless of creditors of the husband. What is the difference in principle between taking out a new policy and having one already in existence assigned with the consent of the company? We perceive no substantial difference, and hence we must hold

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that Mrs. Cole, under the statute, had a clear right, with the consent of the company, to accept an assignment of the policy.

But under the statute, Cole being insolvent, all premiums paid by him on the policy within five years next before this action was brought, with interest thereon from the date of payment, could be recovered by the creditors. The action was commenced in October, 1878. The premiums paid in July, 1873, and all paid before that time, would be barred by the statute, but the complainant was entitled to recover the premium of \$501.60 paid July 17, 1874, and \$501.60 paid July 17, 1875, and \$501.60 paid July 17, 1876, with 6 per cent interest on each of said amounts from the date of payment.

[Omitting a statutory consideration.]

The judgment of the appellate court will be reversed, and the cause remanded for further proceedings consistent with this opinion.

Judgment reversed.

SHELDON, J., dissented.

REDLICH V. BAUERLEE.

(98 Ill. 134.)

Evidence — books of account — original entries.

Where a tradesman's clerk makes original entries of sales on a slate, and within a reasonable time the tradesman correctly transcribes them in a book the two comparing the transcript with the original entries, the book, on proof of these facts, is competent evidence of the sales.

ACTION on account. The opinion states the facts. The plaintiff had judgment below.

Lyman & Jackson, for appellant.

C. C. Kohlsaat, for appellee.

SCHOLFIELD, J. Of the four errors assigned upon this record, there is but one that we can inquire into. The third and fourth present questions of fact only, and the finding of the appellate court is conclusive as to them.

[Omitting a minor point.]

The remaining error, the first, in the order of the assignment, is "that the referee admitted the plaintiff's books of account, which were not books of original entries, in evidence, and his finding against the defendant was based chiefly upon said books of account."

Appellee produced his books of account and testified that they were such, and that the entries therein were made by himself, and that they were true and just. It is proved by his evidence and that of his foreman, Charles Keppleberg, that the books were kept in this way:

As the goods, which were pressed blocks, plugs, bungs, faucets, etc., were manufactured by appellee for appellant, Keppleberg counted them into barrels belonging to appellant, and wrote down the count on a double slate kept for that purpose. No one but Keppleberg kept the slate. Once a month, Keppleberg would deliver the slate to appellee, who would take it home in the evening, and copy the entries on the slate into his book and return it next morning. Appellee and Keppleberg would then compare the slate and the book, and finding the book correct, they would rub out the entries on the slate. This comparing, the witnesses say, was very carefully done. When Keppleberg was absent, which happened only a few days in the year—at the outside, six days,—appellee would make a memorandum of the account and give it to Keppleberg to enter on the slate when he returned, and he saw Keppleberg write down what he gave him. Appellee put down the prices when he entered the items in his books.

The evidence of Keppleberg is, that appellant received all the goods with which he is charged.

We think, on this preliminary evidence, the books were properly admitted. The fact that the charges, in the first instance, were made on a slate and were subsequently transferred to the books admitted in evidence, does not destroy the character of the books as those of original entries. The minutes on the slate were mere memoranda, to assist the memory until the items were transferred to the books, and were not intended to be permanent. *Fazon v. Hollis*, 13 Mass. 427; *Pillsbury v. Locks*, 33 N. H. 96; *Hall v. Glidden*, 39 Me. 445; *Stroud v. Tilton*, 3 Keyes, 139; *Sickles v. Mather*, 20 Wend. 72; *Davison v. Powell*, 16 How. Pr. 467; *Landis v. Turner*, 14 Cal. 575; *Hartley v. Brookes*, 6 Whart. 189; *Whitney v. Sawyer*, 11 Gray, 243.

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Although the entries were drawn off by appellee, the subsequent comparison of the entries upon the slate with those in the books made it certain that they were correctly copied into the books. The authorities do not establish any precise length of time within which such entries shall be transcribed; "it suffices if it be within a reasonable time, so that it may appear to have taken place while the memory of the fact was recent, or the source from which a knowledge of it was derived is unimpaired." *Jones v. Long*, 3 Watts, 325; *Hall v. Glidden*, *supra*. Here, as in *Hall v. Glidden*, the source of knowledge was unimpaired, and there is no reason to believe the memory of the facts to have been forgotten when transcription was made. The entry on the slate was at the time the goods were delivered, "and from the nature of the case it could not be permanent. It had not been obliterated"—and if the evidence of the witnesses who testified in regard to this matter may be relied upon, there can be no doubt that the entries in these books against appellant are correct charges.

We think the preliminary proof brought the books within the spirit of the third section of the "act in regard to evidence and depositions in civil cases," in force July 1, 1872, Revised Statutes of 1874, p. 489; and there was therefore no error in admitting them in evidence. The judgment of the appellate court is affirmed.

Judgment affirmed.

KING V. DAVENPORT.

(98 Ill. 306.)

Municipal corporation — ordinance — fire limits — nuisance.

A city ordinance, in pursuance of the charter authority, establishing fire limits, and declaring wooden roofs thereafter erected within such limits to be a nuisance, and requiring the marshal, under the mayor's order, summarily to remove them, is reasonable and valid.*

TRESPASS. The opinion states the case. The plaintiff had judgment below.

Brown, Kirby & Russell and *C. H. Dummer*, for appellants.

Morrison, Whillock & Lippincott, for appellee.

* See *Mayor and Council of Monroe v. Hoffman* (29 La. Ann. 651), 29 Am. Rep. 345, and note, 348.

SHELDON, J. The city of Jacksonville, in this State, having power, by ordinance, to establish fire limits and to declare the building or repairing of buildings with combustible materials within the fire limits a nuisance, its city council did, by ordinance, establish fire limits, and enacted that any building built or repaired with other than fire-proof material, or any roof or gutter placed on any building, the outer surface of which was made with materials other than fire-proof, if within the fire limits, and done without permission, should be deemed a nuisance, and that if the offender, upon reasonable notice, failed to remove such wooden building, or wooden part of such building, the city marshal, upon the written direction of the mayor, should "remove or tear down such building, or such part thereof as may be necessary." The ordinance further provided, that the offender should be subject to a fine of \$100 for each week he failed to remove such wooden building, or wooden part thereof, and that if the city caused the removal, the expense of the removal might be recovered of the offender. The plaintiff's testatrix violated this ordinance by taking off an old and out-of-repair shingle roof from her building, situated within the fire limits, and putting thereon, without permission, a new shingle roof. She failing to remove the same upon due notice, the roof was removed by the city marshal, in conformity with the ordinance.

She brought this suit of trespass against the mayor and marshal of the city for the removing of the roof, and dying since the bringing of the suit, her executor was substituted as plaintiff. The defendants justified under the ordinance, and on trial by the court, without a jury, judgment was rendered against them for \$175, which, on appeal to the appellate court for the Third District, was affirmed, and then the present appeal taken, the proper certificate having been made to authorize it.

The sole question here presented is upon the validity of the ordinance.

By its charter the following legislative power is delegated to the city of Jacksonville: "The city council, for the purpose of guarding against the calamities of fire, shall have power to prohibit the erection, placing or repairing of wooden buildings within the limits prescribed by them, without their permission, and direct and prescribe that all buildings within the limits prescribed shall be made or constructed of fire-proof materials, and to prohibit the rebuilding of wooden buildings; to declare all dilapidated buildings to be

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nuisances, and to direct the same to be removed, repaired or abated, in such manner as they shall prescribe and direct; to declare all wooden buildings which they may deem dangerous to contiguous buildings, or in causing or promoting fires, to be nuisances, and to require and cause the same to be removed or abated in such manner as they shall prescribe.

"And generally to establish such regulations for the prevention and extinguishment of fires as the city council may deem expedient.

"The city council shall have power to pass, publish and repeal all ordinances, rules and police regulations, not contrary to the Constitution and laws of the United States and of this State, * * * or proper to carry into effect the powers vested by this act in the corporation; to determine what shall be a nuisance and provide for the punishment, removal and abatement of the same; and also to punish violations of its ordinances by fines, penalties and imprisonment," etc.

"To define and declare what shall be nuisances, and authorize and direct the summary abatement thereof."

There is here given ample authority, we think, for the passage of the ordinance in question.

The inquiry then must be, whether the enactment of such a law is within the competency of legislative power. Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all, says Chancellor KENT, be interdicted by law in the midst of dense masses of population, on the general and rational principle that every person ought so to use his property as not to injure his neighbors, and that private interests must be made subservient to the general interests of the community. 2 Kent Com. 340. The right to restrain owners of land in towns from erecting wooden buildings, except under certain restrictions, has never been doubted, or if it has been, the doubt has long since been removed. *Commonwealth v. Tewksbury*, 11 Metc. 58. Such regulation is but "a just restraint of an injurious use of property, which the legislature have authority to make." Id. 59. But the particular respect in which the ordinance is assailed, is, that it authorizes the abatement of the nuisance summarily, without any prior adjudication of the right to exercise the power.

The summary abatement of nuisances is a remedy which has ever existed in the law, and its exercise is not regarded as in conflict with constitutional provisions for the protection of the rights of private property. Blackstone, in his classification of remedies by the act of a party, says, "the fourth species of remedy by the mere act of a party injured is the abatement or removal of nuisances." 3 Black. Com. 5. And that "the reason why the law allows this private and summary method of doing one's self justice is because injuries of this kind, which obstruct or annoy such things as are of daily convenience for use, require an immediate remedy and cannot wait the slow progress of the ordinary forms of justice."

Hart v. Mayor, 9 Wend. 571, 24 Am. Dec. 165, was the case of an injunction to restrain the city authorities from removing a boat or ark which Hart had built in the basin at Albany, which the authorities were proceeding to remove under the city ordinance. The power to do the act by the city authorities (which the court affirmed) was placed by Justice SUTHERLAND, in his opinion, upon the ground that the act of Hart was an unauthorized obstruction in the basin at Albany. After holding the ordinance invalid, for reasons that do not apply here, he said: "But the real question in this case is not whether the ordinance in question, considered as a legislative act, is valid, but whether the corporation had power, upon any principle whatever, to do the act which the ordinance authorized to be done. If this is a case in which the corporation, or any other person, had a right summarily to remove or abate this obstruction, then the objection that the appellants, by this course of proceeding, may be deprived of their property without due process of law or trial by jury, has no application. Formal legal proceedings and trial by jury are not appropriate to, and have never been used in such cases."

Senator EDMUNDS, in his opinion, says: "Much stress was laid by the counsel upon the fact that the exercise of the right claimed by the respondents would result in the destruction of their property without the benefit of a trial by jury, and that consequently, the ordinance in question was a violation of the Constitution, and the bill of rights. The same objection would apply to the dejection of every nuisance, yet nothing is clearer or better settled than the right to exercise this power in a summary manner, not only where the whole community is affected, but where a private individual alone is injured. This is a right necessary to the good order of society," etc.

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The case of *Baker v. Boston*, 12 Pick. 193, respected an ordinance providing for filling up a creek for sanitary purposes, and action thereunder, for filling up the creek, as being an injury to private property. The court sustained the action of the city, and say: "Police regulations, to direct the use of private property so as to prevent its proving pernicious to the citizens at large, are not void, although they may, in some measure, interfere with private rights without providing for compensation. This principle was settled in the cases of *Vanderbilt v. Adams*, 7 Cow. 349, and *Stuyvesant v. Mayor*, id. 588. And the counsel for the failing party in the latter case admitted that the principle was too clear to be questioned. 'The contrary doctrine,' says the court in the same case, 'would strike at the root of all police regulations.' The officer of the mayor and aldermen stand on the same footing as quarantine and fire regulations; and if by such regulation an individual receives some damage, it is considered as *damnum absque injuria*. The law presumes he is compensated by sharing in the advantages from such beneficial regulations. *Dore v. Gray*, 2 T. R. 358; *Governor, etc., v. Meredith*, 4 id. 794."

The case of *Wadleigh v. Gilman*, 3 Fair. 403, is one directly in point in support of the present defense.

The plaintiff there, in violation of the city ordinance, had removed a building built of combustible materials from one point within the fire limits to another point within such limits. The building was taken by the city authorities, without resorting to judicial process, and the owner brought his action of trespass. The defendants, the street commissioner and the city marshal, justified under the ordinance. The court held that under its charter, by implication, the city was authorized to make all "necessary police regulations;" that the ordinance was a discreet exercise of the police power, and was a full justification of the acts of the defendants. The court say that "police regulations may forbid such a use, and such modifications of private property as would prove injurious to the citizens generally." "Laws of this character are unquestionably within the scope of the legislative power, without impairing any constitutional provisions."

Judge Cooley, in his work on Constitutional Limitations (4th ed.), 748, concludes a discussion of the subject with the following statement: "And generally it may be said that each State has complete authority to provide for the abatement of nuisances,

whether they exist by the fault of individuals or not, and even though in their origin they may have been permitted or licensed by law. And see *Watertown v. Mayo*, 109 Mass. 315.

In *Blair v. Forehand*, 100 Mass. 136; s. c., 1 Am. Rep. 94, and *Morey v. Brown*, 42 N. H. 373, it was held not unconstitutional to authorize the destruction of dogs, without previous adjudication, when found at large without being collared according to the statutory regulation. In the former of which cases it was said: "In the exercise of this (police) power, the legislature may not only provide that certain kinds of property (either absolutely, or when held in such a manner or under such circumstances as to be injurious, dangerous or noxious), may be seized and confiscated upon legal process after notice and hearing; but may also, when necessary to insure the public safety, authorize them to be summarily destroyed by the municipal authorities without previous notice to the owner — as in the familiar cases of pulling down buildings to prevent the spreading of a conflagration or the impending fall of the buildings themselves, throwing overboard decaying or infected food, or abating other nuisances dangerous to health."

In *Murray's Lessee v. Hoboken Land Co.*, 18 How. 272, it was held that a distress warrant issued by the solicitor of the treasury under the act of Congress of May 15, 1820, against a collector of customs for an indebtedness due to the government, was not inconsistent with the Constitution of the United States in the respect that it prohibits a citizen from being deprived of his liberty or property without due process of law, as summary process of distress for the recovery of debts due to the government was a well-known extra-judicial remedy of the common law. For like reason, the supporting of this ancient extra-judicial remedy of the abatement of a public nuisance is not inconsistent with the similar provision in our own State Constitution.

In *Toledo, Wabash and Western Railway Co. v. City of Jacksonville*, 67 Ill. 40; s. c., 16 Am. Rep. 611, we said: "What are reasonable regulations, and what are subjects of police powers, must necessarily be judicial questions. The law-making power is the sole judge when the necessity exists, and when, if at all, it will exercise the right to enact such laws." It was said however that such regulations must be what they purport to be, police regulations, and must be reasonable. In *Austin v. Murray*, 12 Pick. 126, the court assumed to determine what was a reasonable police regu-

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lation, and that the regulation there in question was not a police regulation, made in good faith as such.

There can be no doubt, it seems to us, that the ordinance in question was a police regulation, proper, and made in good faith, "for the purpose of guarding against the calamities of fire," in a populous neighborhood ; and we must regard it as an entirely reasonable regulation. There is no more frequent or admittedly proper exercise of the police power, than that of the prohibition of the erection of buildings of combustible materials in the populous part of a town, and the only means of making such prohibition effectual is by summary abatement. Every moment's delay in the removal of the nuisance is constant exposure to danger. Before any judicial inquiry and hearing could be had in the matter, the whole evil sought to be guarded against might be produced.

The imposition of a penalty would but punish the offender, it would not remove the source of danger. This latter is the thing which the necessity of the case requires, and immediate abatement is the only competent remedy. It is admitted by appellee's counsel, (an admission they are compelled to make under the law), that if this erection were a nuisance at common law the city authorities might abate it. But what is a nuisance at common law ? Blackstone's definition is, whatsoever unlawfully annoys or doth damage to another is a nuisance. The construction of this wooden roof was an unlawful thing, made so by ordinance prohibiting its construction. That it was, in its nature, injurious, and a source of constant danger in a populous place, experience and the general prevalence of this sort of legislation we are considering, teach us. Such was the view of the legislature in the matter, that by the charter of this city, for the purpose of guarding against the calamities of fire, they authorized the city council to prohibit the erection or repairing of wooden buildings within the fire limits they might prescribe, and to declare such buildings to be nuisances, and cause the same to be abated as they should direct.

In pursuance of such authority, the city council established fire limits, and by ordinance declared any such roof as the one in question, which should be put upon a building within such limits, to be a nuisance, and required the city marshal, under an order from the mayor, to remove the same.

Such an ordinance, enacted in pursuance of legislative authority, has the force of a statute, and may be viewed as though such, in the

treatment of the present subject. We have here then what is a nuisance in fact, that which is declared to be such by ordinance—determined by law to be a nuisance—and why may not the remedy by abatement, under the ordinance, belong to it as well as in the case of any nuisance at the common law? The reason for it is equally strong. As before said, there is no other competent remedy to meet the necessity of the case.

Further, the charter authorizes the provision for summary abatement, and the ordinance consequently gives it. How is a nuisance to be abated by the city except by a summary proceeding? The term itself imports such a proceeding. This case is quite different from *Yates v. Milwaukee*, 10 Wall. 497, cited by appellee's counsel, where the court held that the mere declaration of the city council could not make an existing structure a nuisance unless it had in fact that character, and that it was not allowable "that a municipal corporation, without any general laws, either of the city or of the State, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself." The thing here, we regard, had the character of a nuisance. It was constructed in the face of a general ordinance of the city, long before passed, prohibiting any such structure, and declaring it to be a nuisance and subject to be abated as such. It was a reasonable regulation for the future, and plaintiff's defiant disobedience of it leaves her no reason for complaint of the declared consequences.

Exception is taken to the particular wording of the ordinance, in the respect that the city marshal shall "remove or tear down such building, or such part thereof as may be necessary." It is asked, who shall determine what part is necessary? The ordinance had before declared the erection, repairing or enlargement of such a building a nuisance, and the words, "or such part thereof as may be necessary," evidently refer to the repairing or enlargement of the building; that such part of the building as had been repaired or enlarged might be torn down; that is, such part of it as was necessary to remove the enlarged or repaired portion. If we may imagine some case of a repair where it might be difficult to determine what part should be torn down as being necessary, there could be none such here, where the repair was a distinct, separate and entire thing—the putting on the roof of a building. As applied

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to the present case, there can be no doubt that the ordinance authorized the removal of the whole roof that had been put on.

We do not then find the provision of the city charter authorizing the city council to declare the structure in question a nuisance, and to abate it summarily, to be in conflict with the Constitution, and therefore hold the ordinance to be valid, and that it was a justification of the acts of the defendants in the removal of the roof.

The judgment of the appellate court is reversed, and the cause remanded for further proceedings in conformity with this opinion.

Judgment reversed and cause remanded.

FALKER, J., dissented.

CITY OF EAST ST. LOUIS v. EAST ST. LOUIS GAS-LIGHT AND COKE COMPANY.

(98 Ill. 413.)

Municipal corporation — contract — for lighting streets — term of.

A city, authorized to contract generally, and to provide for lighting its streets, contracted with an incorporated gas company for lighting the streets for thirty years. The gas company was by its charter given the exclusive privilege of supplying the city with gas for that term. The charter forbade the city to incur any indebtedness exceeding five per cent on the valuation of its taxable property. The contract, if executed, would have exceeded that limit. *Held*, that the contract was valid, at least so far as executed on the part of the gas company.

ACTION on contract. The opinion states the case. The plaintiff had judgment below.

M. Millard and J. M. Freels, for appellant.

R. A. Halbert, John B. Bowman, and C. F. Nætling, for appellee.

SHELDON, J. This was an action brought by the East St. Louis Gas-light and Coke Company against the city of East St. Louis, for money claimed to be due under a contract entered into between the parties on the 3d day of October, 1874, in pursuance of an ordinance of the city council directing it, by which the gas-light com-

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pany agreed to extend its street main pipes within the present and future limits of the city, whenever and wherever the city should order public lamps to be erected, upon connecting lines, not less than one lamp for every 125 feet of street main, and that the company should erect lamp-posts and furnish gas for the sum of \$35.20 per lamp per year, to be paid in monthly installments, upon bills therefor rendered by the company. Two hundred lamps were to be furnished at once along the then present-main pipes of the company, which were accordingly furnished, and were first lighted in November and December, 1874, and have been kept lighted ever since. On November 10 and December 17, 1875, ordinances were passed by the city council requiring severally the erection of additional public lamps, and the extension accordingly of the company's street main pipes; and in pursuance thereof the company extended its street main pipes along the streets named in these ordinances, over a distance of 13,500 feet—more than two and one-half miles—and erected thereupon 103 street lamp-posts and lamps in addition, and lighted these in January and February, 1875, and ever since. The contract was to continue for the term of thirty years, from October 1, 1874. The suit was brought for the street light furnished in pursuance of the contract for the months of March, April, May, June, July and August, 1877, amounting to \$5,440.56.

The declaration contains a special count upon the contract, and the common counts. The company recovered in the Circuit Court the contract price—the sum sued for. On appeal to the appellate court for the Fourth District the judgment was affirmed, and the city appealed further to this court.

The defense is placed solely upon the ground that the city had no power to make the contract.

By its charter (vol. 1, p. 885, *Private Laws 1869*), the city of East St. Louis is given power to contract and to be contracted with, to sue and be sued, etc. It is further provided therein, that the city council shall have power, by ordinance, to establish hospitals, etc.; to provide the city with water, etc.; to provide for lighting the streets of the city, and erecting lamp-posts; to provide for the erection of all needful buildings for the city, etc.; to establish a work-house or houses of correction; to make, pass, publish, amend and repeal all ordinances, rules and sanitary regulations that may be necessary to carry into effect the powers vested by the charter in the city.

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The charter of this East St. Louis Gas-light and Coke Company is in evidence, found in vol. 1, pp. 584, 585, Private Laws, 1865, creating it a body corporate, with power to contract and be contracted with, and giving it power and authority to manufacture and sell gas and coke, and to be used for the purpose of lighting the town of East St. Louis and the territory between its boundary and the Mississippi river, in St. Clair county, Illinois, or the streets, etc., therein.

Section 4 is: "Said company shall have the exclusive privilege of supplying the said town of East St. Louis and said additional territory and the inhabitants thereof with gas, for the purpose of affording light, for thirty years, provided the rate of their charges for gas furnished shall not exceed the rate charged for gas by the Belleville Gas-light and Coke Company, and ten per cent in addition to said last rate."

It will thus be seen that the city is given power to contract and be contracted with, and this must extend to the purposes of its incorporation. Among such purposes are the ones above enumerated—to establish hospitals, to provide the city with water, to provide for lighting the streets and erecting lamp-posts, to provide for the erection of needful buildings, to establish a work-house or houses of correction.

How are these various objects to be accomplished, except through the means of contract? The mere ordaining with respect to them will not secure them. When the city has once determined upon the execution of any one of these provisions, then contract becomes necessary for carrying into effect the determination, as for the purchase of ground, the erection of buildings, the obtaining of the supply of water or street light.

After having acted under the power "to provide for lighting the streets and erecting lamp-posts," by determining to light the streets with gas, and what streets shall be lighted, it is for the city to decide how it shall provide the material for lighting—whether by the erection of its own gas works, etc., and the manufacture of its own gas, or contracting with others for its supply; but whichever the mode adopted, it is only through the means of contract that it can be carried out.

But for the city's contracting with this company upon the subject, sufficient sanction is found in the charter of the company, one of the very purposes of whose creation, as expressed in its charter,

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is to manufacture and sell gas for lighting the streets of the town of East St. Louis, and the company is given the exclusive privilege of supplying the town of East St. Louis with gas, for the purpose of affording light, for thirty years, the maximum charge therefor being fixed by the charter. Here is surely an expression of the design and purpose of the legislature that the town of East St. Louis might contract with this company for the supply of gas for lighting its streets. The town of East St. Louis is identical with the city of East St. Louis, it having been reorganized as a city in April, 1865, and rechartered under its present charter of March 26, 1869.

But the particular objection which is taken to this contract, as it has been made, is its term of duration—for thirty years. In this respect it is insisted the contract is an abridgment of the legislative or governmental power of the city, in that it barter away the power of the legislative body of the city to legislate on the subject for thirty years.

The doctrine, as declared in 1 Dill. on Mun. Corp., § 61, is referred to, viz.: "Powers are conferred upon municipal corporations for public purposes, and as their legislative powers cannot, as we have just seen, be delegated, so they cannot be bargained or bartered away. Such corporations may make authorized contracts, but they have no power as a party to make contracts or pass by-laws which shall cede away, control or embarrass their legislative or governmental powers, or which shall disable them from performing their public duties." It is contended that under this doctrine the contract stands condemned, and is void.

At first blush the contract may seem objectionable, as unnecessarily tying up the hands of the city council for such a length of time, though some excuse therefor may be found in the presumed difficulty of securing a contract for the construction of such expensive works as are here involved, without the assurance of patronage for some considerable length of time, and in the mention in the company's charter of thirty years as the time for the exclusive supply of the city with gas light.

Whether this length of time of the running of the contract be a valid objection to it, we deem it unnecessary to determine for the purpose of this suit, and would not be understood as expressing any opinion in that regard, for admitting that the contract cannot be upheld in this respect, it is an objection we conceive which applies only to the executory part of the contract, and has no application

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to the executed part of it. It does not appear in the case, nor is it claimed, that the city has exercised its power, by ordinance or otherwise, or manifested its wish, to provide differently from the contract for the lighting of its streets. So far as the contract has been executed, it has been one for the furnishing of the light during the pleasure of the city. Had the contract been in that form, it would not have been obnoxious to the objection made to it. Courts should not destroy the contracts made by parties further than some good reason requires. Such an objection as is made to this contract, that it interferes with the exercise of the legislative or governmental power of the city over the subject, does not require that the contract should be held void, but only voidable so far as it is executory. It is enough for the obviating of any such objection, that there be the right at any time to avoid the contract, so that there may be the freedom to exercise its governmental power in regard to the subject, when and as the city pleases. So far as the contract has been performed, by furnishing light to the city without its disaffirmance of the contract, it may be treated as if it had been a single contract for the furnishing of the light for the months in question alone, and one fully completed. The gas light having been furnished and enjoyed by the city without objection, it should pay for it. There was no interference with the exercise of any legislative or governmental power upon the subject. As well after the erection of a hospital or work house, or other needful building, or gas works for itself, under a contract for such erection or construction, had one been made, might the city refuse to pay therefor, because the contract, during the time of its running, was an abridgment of the city's governmental power to provide otherwise in respect to the subject-matter, as to refuse to make payment in the present case for the gas light which has been furnished. We do not see why there would not be as much force in the objection which is here made, in the one case as in the other.

There can be no doubt that it was within the scope of the authority of the city to contract upon the subject. There is nothing of illegality in the contract, such as requires that it should be held void in the whole—the part performed as well as that not performed; and what the city has received and enjoyed the benefit of, under the contract, there is no principle of law which will justify it in its refusal to pay for.

The general rule applying in such case is thus stated in 2 Pars. on

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Cont. 790: "A general rule has been asserted, which certainly rests upon reason and justice. It is, that where a party has accepted and made his own the benefit of a contract, he has estopped himself from denying in the courts the validity of the instrument by which those benefits came to him."

In *Field on Corporations*, § 273, ¶ 8, the following is deduced as the conclusion from an extended examination of the authorities upon this subject: "The better doctrine would seem to be, that where a contract *ultra vires* has been made by a corporation, and it has received the full consideration, and appropriated the same so that it cannot be restored and the other party placed in *statu quo*, and especially where no objection is interposed upon the part of those who might have made it; the corporation will generally be bound by the contract, the same as a natural person."

In *Hitchcock v. Galveston*, 96 U. S. 341, the city council of Galveston had contracted with Hitchcock and others for the construction of certain sidewalks, to be paid for by the issue of city bonds. After the work was partly performed, the city council stopped the work and prevented its completion. The action was for this breach of the contract. It was objected that by reason of the supposed want of power to issue the bonds, the entire contract was void, and no action could be maintained for the breach thereof. The Supreme Court of the United States held that the city was liable to the extent of the work actually performed under the contract, even though it had no lawful authority to issue the bonds, and in discussing the subject said: "It is enough for them (plaintiffs) that the city council have power to enter into a contract for the improvement of the sidewalks; that such a contract was made with them; that under it they have proceeded to furnish materials and do work, as well as to assume liabilities; that the city has received and now enjoys the benefit of what they have done and furnished; that for these things the city promised to pay; and that after having received the benefit of the contract the city has broken it. It matters not that the promise was to pay in a manner not authorized by law. If payments cannot be made in bonds because their issue is *ultra vires*, it would be sanctioning rank injustice to hold that payment need not be made at all. Such is not the law. The contract between the parties is in force, so far as it is lawful." Citing as in support of the decision the case of the *State Board of Agriculture v. Citizens' Street Ry. Co.*, 47 Ind. 407, where it was

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held, that "although there may be a defect of power in a corporation to make a contract, yet if a contract made by it is not in violation of its charter, or of any statute prohibiting it, and the corporation has by its promise induced a party relying on the promise and in execution of the contract to expend money and perform his part thereof, the corporation is liable on the contract." See *Daniels v. Tearney*, 102 U. S. Rep. 415.

This doctrine was, by this court, recognized and applied in its full extent in the case of *Bardley v. Ballard*, 55 Ill. 413; s. c., 8 Am. Rep. 656, though, that being the case of a private corporation, it was there said there might be a difference with respect to municipal corporations, and that their debts illegally contracted by their officers would not be binding upon tax payers. But the present is no such case of a debt illegally contracted — there is, at most, but a defect of power to make a contract running for so long a time, and we consider, in the circumstances of this case, that the doctrine above enunciated applies here with equal force as in any case of a private corporation.

It is insisted further, that the city had no power to make the contract in question, because thereby an indebtedness was incurred in excess of the limitation fixed by section 12, art. 9 of the Constitution of the State. The provision in this respect is, that no municipal corporation "shall be allowed to become indebted in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for State and county taxes previous to the incurring of such indebtedness. Any * * * municipal corporation incurring any indebtedness as aforesaid, shall before or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same." It appears that the previous indebtedness of the city existing at the time this contract was made, was \$20,000 short of this constitutional limit. Two hundred lamps — the minimum number provided for by the contract — at \$35.20 per lamp per year, would amount to \$7,040 in a year, and to an aggregate for thirty years of \$211,200.

Now appellant's counsel contend that this aggregate sum of

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\$211,200 should be considered as a present indebtedness — as a debt incurred at the making of this contract on October 3, 1880.

We do not assent to the correctness of this view.

The contract was for the furnishing of an article for nightly consumption by the city during a period of thirty years, fixing the price at which the articles should be furnished. There was no indebtedness in advance of any thing being furnished, but indebtedness arose as gas should have been furnished along from night to night during the period of thirty years. The contract provides for the payment, monthly, at the end of each month, the amount that became due for the month then ended. When the company has furnished the gas for a certain month, then there is a liability — an indebtedness arises — and not before, as we conceive. Hence the amounts that might become due and payable under the contract in future years, did not constitute a debt against the city at the time of the entering into the contract, within the meaning of the Constitution.

Had the contract been performed in compliance with its terms, as it should and presumptively would have been, there would have arisen no indebtedness on the part of the city for more than one month's supply of gas. As already observed, this gas light was one of the ordinary current expenses of the city, it being furnished and consumed nightly, which would be and was presumably provided for and met by the annual appropriation and levy of taxes to pay the ordinary current expenses of the year, and from the city's other sources of revenue. We are clearly of opinion the contract does not fall within the constitutional inhibition.

It appears that on February 1, 1877, the city was indebted \$50,000 in excess of the constitutional limit. This might have been, and yet the city, in the subsequent months, at the times the gas sued for was furnished, may not have been indebted beyond the constitutional limit; and this, without further noticing the point, we deem a sufficient answer to the objection made, that the city, at the times when the gas was furnished, was indebted beyond said limit. Such a defense in a case such as this, if it be one, must be strictly made out.

The judgment of the appellate court will be affirmed.

Judgment affirmed.

DICKEY, C. J. Although the extracts from Parsons and from

Collins v. People.

Field, contained in the opinion of the court delivered by Mr. Justice SHELDON in this case, relate solely to the law in respect to private corporations, and although it is expressly declared by this court in *Bradley v. Ballard*, that "what we have said applies only to private corporations organized for gain," and that "municipal corporations stand upon a different ground," still it is plain that the principle (stated in *Parsons* and in *Field*, and applied by this court to a private corporation in *Bradley v. Ballard*), must logically be equally applicable to a municipal corporation in all cases where the act from which the estoppel arises, and also the act for a failure to perform which the action is brought, are both within the acknowledged powers of such municipal corporation. In this case the estoppel arises from the act of the city in receiving the gas without objection, under the contract, in which the price *pro tanto* was specified. This act the city, under its charter, had full power to perform. The act which the city became bound by its conduct to perform was to pay for the gas received at the price agreed upon, and it is for a failure to perform this act this action is brought. The city had full power, under its charter, to pay for the gas received, and also power to fix the price by contract.

WALKER, J. dissented.

COLLINS V. PEOPLE.

(98 ILL. 584.)

Criminal law — evidence — uncorroborated accomplice.

A conviction may be had on the uncorroborated testimony of an accomplice, although the court may, in its discretion, advise the jury not to convict unless the accomplice is corroborated.*

(CONVICTION of burglary upon the testimony of an accomplice.
The opinion states the case.

E. B. McClanahan and W. S. Forrest, for plaintiff in error.

James McCourtney, attorney-general, for people.

SCOLFIELD, J. [Omitting a statutory consideration.] The effect

* See *Com. v. Holmes* (127 Mass. 424), 34 Am. Rep. 301.

to be given to the evidence of an accomplice presents a different question for our consideration. In *Gray v. People*, 26 Ill. 344, in reply to the objection that had there had been urged in argument that the testimony of the accomplice was uncorroborated, it was said, this is no objection," and that "whether the evidence produced to confirm the accomplice is satisfactory or not, is a question which the jury has to determine."

The same thing was repeated in *Cross v. People*, 47 Ill. 152. In both cases the language of Lord ELLENBOROUGH, in *Jones' case*, was quoted: "That judges, in their discretion, will advise a jury not to believe an accomplice unless he is confirmed, or only in so far as he is confirmed; but if he is believed, his testimony is unquestionably sufficient to establish the facts to which he deposes." And in the latter case it is added, after citing *Commonwealth v. Bosworth*, 22 Pick. 397, and *Commonwealth v. Savory*, 10 Cush. 535: "And this seems to be the more modern and approved doctrine. It is a matter of discretion with the court to advise, rather than a rule of law. 1 Phil. on Ev. 34, 39; McNally on Ev. 197. If a jury believe, from the testimony of an accomplice, who may have been induced to make disclosures, from remorse, or from any other motive, why should they not be allowed to credit him? Is he in a position different from any other witness whose credibility is to be inquired into by the jury? We can see no real difference."

It is true, as objected, what was said in this case was not, in the view taken by the court of the evidence, essential to a decision of the case,—but if it be sound law, this is unimportant.

Counsel say: "The old law of England was in accord with the *dicta* on this subject found in Illinois Reports. But the law in England, since the beginning of this century, has been, that a verdict will not be permitted to stand which is sustained only by the evidence of an alleged accomplice, uncorroborated, as to identity of the accused."

This, we think, is a misapprehension. As late as the 24th of November, 1855, in the Court of Criminal Appeal, it was said by JARVIS, C. J., in *Regina v. Stubbs*: "It is not a rule of law that accomplices must be confirmed in order to render a conviction valid, and it is the duty of the judge to tell the jury that they may act on the unconfirmed testimony of an accomplice; but it is usual in practice for the judge to advise the jury not to convict on such testimony alone, and juries generally attend to the judge's direc-

tion, and require confirmation. But it is only a rule of practice." And this was concurred in by all the members of the court. 33 Eng. L. and Eq. 551.

In the earlier case of *Rex v. Hastings*, 7 C. & P. 152 (decided in 1835-6), Lord DENMAN said: "I consider, and I believe my learned brothers agree with me, that it is altogether for the jury, and they may, if they please, act upon the evidence of the accomplice without any confirmation of his statement. But we would not, of course, be inclined to give any great degree of credit to a person so situated." See also Joy on the Evidence of Accomplices, 20 Law Library, 5, *3 and 11, *16. The same doctrine is followed in *State v. Potter*, 42 Vt. 495; *People v. Costello*, 1 Den. 83; *Stocking v. State*, 7 Ind. 326; *Johnson v. State*, 2 id. 652; *Dawley v. State*, 4 id. 128; *State v. Stebbins*, 29 Conn. 463; *State v. Watson*, 31 Mo. 361; *Sumpter v. State*, 11 Fla. 247.

What was said in *Cross v. People*, *supra*, it is thus seen, is abundantly sustained by authority, and no reason is perceived why it should be, in the least, departed from or modified.

The tendency with us, at present, is to arbitrarily exclude as little as possible, but to listen and give credence to whatever tends to establish the truth. The innocent should not be convicted, nor should the guilty escape punishment, by reason of any merely arbitrary rule preventing the free and full exercise of the judgment as to the truthfulness or untruthfulness of testimony, and the reliance to be placed upon it in the trial of cases. In many, probably in most cases, the evidence of an accomplice, uncorroborated in material matters, will not satisfy the honest judgment beyond a reasonable doubt—and then it is clearly insufficient to authorize a verdict of guilty. But there may frequently occur other cases, where, from all the circumstances, the honest judgment will be as thoroughly satisfied from the evidence of the accomplice of the guilt of the defendant, as it is possible it could be satisfied from human testimony,—and in such case it would be an outrage upon the administration of justice to acquit.

WALLACE V. DEYOUNG.

(987 . 638.)

Master and servant — work for others out of business hours.

In an action for services, it is no defense that the services were rendered while the claimant was an employee of a third person in another line of business, and both during and out of the business hours of such third person.

ASSUMPSIT. The opinion states the case. The plaintiff had judgment below.

Small & Moore, for plaintiffs in error.

S. K. Dow, for defendant in error.

WALKER, J. This was an action of assumpsit, brought by defendant in error against J. Seeley Wallace, in his life-time, and revived against the administrators of his estate. The declaration contained the common counts, and the claim of plaintiff in the Circuit Court was for services rendered for deceased in his life-time in preparing papers, signing accounts, and in attending to and looking after his business. A trial was had in the Circuit Court, resulting in a verdict and judgment in favor of plaintiff for \$1,600. The record was removed to the appellate court on error, and on a trial in that court the judgment of the Circuit Court was affirmed. The case is brought to this court by writ of error.

The judgment of the Circuit Court having been affirmed by the appellate court, we are compelled to assume the latter court found the facts as they were determined by the jury. The errors assigned only question the correctness of the instructions given to the jury on the trial. We shall only look to the evidence to determine whether, under the issues, the instructions were proper. It is urged by plaintiffs in error that they did not state the law correctly, and the jury were thereby misled in their finding.

The evidence tended to show that defendant in error was, during several years, employed by Frisbie & Rappleye, agents of the Massachusetts Mutual Life Insurance Company, in Chicago, as their clerk, book-keeper and cashier, on a salary. During the same period

Wallace v. DeYoung.

of time defendant in error acted as the accountant and assisted Wallace in his business, who was engaged extensively in loaning money and purchasing commercial paper. The evidence also tends to show that he so assisted Wallace during, as well as out of, business hours. It is claimed that the services which defendant in error rendered Wallace were within the scope of the business of Frisbie & Rappleye, and were consequently paid for by them, and that he has no legal right to recover from Wallace's estate. It is believed that no one will contest the proposition that Frisbie & Rappleye were entitled only to his labor and skill in the pursuit of the business for which he had been employed to transact, during business hours. They could have no possible claim to his earnings or labor after or before business hours. They only had a right to appropriate his labor and skill during the time devoted to the business which he was employed to transact. All that defendant in error earned by laboring for Wallace out of business hours, surely, on every principle of reason, justice and law, belonged to him. If Wallace employed him, and agreed to pay him for his labor and skill performed out of business hours, Wallace could not be heard to say defendant in error was precluded from recovering because he was at the same time employed by Frisbie & Rappleye to labor for them during business hours. He was clearly entitled to recover for all labor thus performed at the request of Wallace. Such labor could not, by any rule of law, be held within the scope and embraced in his employment by Frisbie & Rappleye.

Then, as to the service rendered by defendant in error for Wallace during business hours, he might, with the consent and approval of his employers, perform them and recover for them; nor could they require him to perform such services for Wallace unless it was within the terms or scope of the agreement when his services were hired. They had no legal right to employ him to perform one kind of service and require him to do another kind. If he chose to do so as a gratuity to his employers, then he had no right to recover for such services as being outside of and beyond his employment. On the other hand, if they, in terms, or by fair implication, consented that he might perform services during office hours for Wallace, and receive compensation therefor, then neither they nor Wallace could object to his recovery for such labor and services. These were facts for the determination of the jury, and they have

found them in favor of the defendant in error, and the appellate court has approved of the finding.

[Omitting minor matters.]

The judgment of the appellate court is affirmed.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

LOVE V. PAYNE.

(73 Ind. 80.)

Partnership — sale of his interest by one partner to a third person.

The managing member of a partnership agreed with an outside person that if he would take a retiring partner's interest and pay a balance due for his share of the capital stock, he should have a certain interest in the firm property free from liens. The money was so paid, but the other partners had no knowledge of the agreement for an unincumbered title. Afterward the partnership property was all sold under a prior mortgage. *Held*, that the new partner had no remedy against the firm.

ACTION for breach of contract. The opinion states the facts. The plaintiff had judgment below.

G. A. Knight, C. H. Knight and I. M. Compton, for appellants.

W. W. Carter and S. D. Coffey, for appellee.

ELLIOTT, J. The Limited Liability Coal Company was the firm name of a partnership, of which all the appellants were members, and this action was instituted by the appellee against the appellants as members of said partnership. The complaint alleges that the

said company entered into a contract with appellee, wherein it was agreed that in consideration of appellee's purchase of the interest of one William Blair, and payment of a certain sum into the partnership, he should be admitted as a partner, and that he should receive a one-fourteenth interest in said partnership property, free from all liens. The breach assigned is that he did not receive such interest, but that the firm suffered all the partnership property to be sold upon a prior mortgage, and that he really received nothing at all of value.

The only assignment of error discussed is that based upon the ruling denying a new trial. The appellants insist that they are entitled to a new trial because of erroneous instructions given the jury.

A very brief synopsis of the evidence will be sufficient to exhibit the questions presented upon the instructions. The appellants were all members of the partnership. John Elliott was the president and general business manager of the company. The company was engaged in the business of mining and selling coal. William Blair was a member of the firm, and appellee bought his interest. The appellee did contract with John Elliott, that if he, appellee, would buy Blair's interest and pay into the partnership \$285, he should receive one-fourteenth interest in the partnership property, free from all liens, and this agreement was made by Elliott while assuming to represent the firm. There was a breach of the contract. We have stated the general effect of the evidence in the form most favorable to the appellee, in order that the legal questions presented by the instructions may be plainly exhibited.

The second instruction asked by the appellee and given by the court is as follows: "If you should find from the evidence, that one John Elliott was a member of the Limited Liability Coal Company, and was acting as president of said company, and while so being a member thereof, and acting as such president, he made a contract with the plaintiff on behalf of said company, whereby the plaintiff became a member of said firm, and in consideration thereof it was agreed that the plaintiff should pay into said firm a given amount of money, and that said company received the plaintiff as a member of said company, and accepted the benefits of said contract, they cannot hold the benefits and at the same time deny the authority of said Elliott to make the same."

This instruction does not assert, as appellants affirm, that Elliott

Love v. Payne.

had a right to bind the partnership because of the authority derived from his relationship to his copartners. If it did, it would be clearly enough obnoxious to the objections pressed against it. The proposition is, not that Elliot had, as a partner, a right to make the contract, but that because the firm received and appropriated the benefits resulting from the act of one assuming to represent the partnership, the partners are liable. The admission of a partner into a firm is not within the line of partnership business, and Elliott would have no authority, as partner, to contract with appellee, that if he would come into the firm, the partners would vest in him a title to one-fourteenth of the partnership property, freed from all liens. It is an elementary rule, that a third person cannot, by buying the interest of one partner, become a member of the firm, unless all the partners consent.

Regarding the instruction as declaring that the partnership was bound by Elliott's acts, not because he was a member thereof, but because he preferred to act for the firm, and the fruits of his acts were received and enjoyed by the partnership, it must still be declared to be erroneous. It is erroneous because it leaves out of consideration the essential element of knowledge on the part of the members of the partnership. The mere coming of the appellee into the firm, and the payment of money into the capital stock, would not, of itself, charge the firm with knowledge of the agreement that he should receive one-fourteenth of the property, free from all incumbrance. The natural inference, in the absence of notice, would be the reverse; for the reasonable conclusion would be, that he stepped into the place of the partner whose share he bought, taking with it all its burdens and benefits. The instruction broadly asserts that the partnership would be bound by accepting the benefit of the contract, and no mention is made of notice or knowledge, on the part of the partners, of the contract of the president and agent, to vest in the incoming partner a title to one-fourteenth of the property, free from the liens then known to exist. The only benefit which the partnership got, or could have got, from the appellee, was the payment of the balance due upon Blair's share of the capital stock of the partnership. If Blair had remained a member, he could have been compelled to pay it, and Payne did no more than what his vendor, the retiring partner, was bound to do. Unless the partners had knowledge of the contract under which Payne came into the firm, they cannot be deemed to be bound because the

former paid his proportionate share of the common contribution to the capital stock. The benefits which the partnership retained were only those which Payne would have been bound to yield as a right to admission, and without some knowledge of a contract, made by a professed agent, giving Payne a right to look to the partnership to convey to him a perfect title to a part of the partnership property, such a contract ought not to be held obligatory upon the partnership. The partners cannot be bound, unless they retained the money after knowledge that a professed agent had, in their behalf, agreed to give the incoming partner an additional or distinct consideration from that arising from the sale to him of the retiring partner's interest, and his admission as a member of the firm.

The appellants, by accepting Payne as a copartner, and by receiving into the common fund his money, did undoubtedly ratify to some extent the acts of Elliott, but not to the extent declared by the instruction. The ratification implied from such acts cannot be so extended as to cover a distinct and independent contract made by the agent and of which the principals had no knowledge. If such a contract was one implied in the admission of Payne into the firm, or was an ordinary incident of such a transaction, then the doctrine of ratification might apply. But the contract upon which the appellees seek a recovery was not implied in, nor incident to, the purchase of Blair's interest and Payne's admission into the firm. By receiving Payne, and taking his money into the common fund, appellants did not ratify a contract of which they were utterly ignorant, and which was not incident to, nor applied in, the admission of Payne as a member of the partnership. The agreement of Elliott, guaranteeing, as in effect it did, that the appellee should receive a perfect title, was totally distinct from the purchase of Blair's interest and Payne's admission as a partner in his stead, and could not be implied from Payne's coming into the partnership and paying his money into the common fund. Ratification, where there is no express notice, can not extend beyond an adoption of the acts of the agent, to the extent fairly and reasonably implied from the nature of the transaction; and in this case, the nature of the transaction would have indicated nothing more than that Payne had taken Blair's place in the firm. To this extent only can it be said that retaining in the common fund the amount paid by Payne is a ratification of Elliott's acts.

Wiseman v. Wiseman.

Other questions are discussed, but as the cause must be remanded for a new trial, we deem it unnecessary to consider them.

Judgment reversed, at costs of appellee.

Judgment reversed.

WISEMAN V. WISEMAN.

(73 Ind. 112.)

Marriage — dower — desertion without adultery.

A wife's right of dower is not defeated by her desertion of her husband without adultery.*

PARTITION for dower. The opinion states the facts. The plaintiff had judgment below.

D. Moss, A. F. Shirts, G. Shirts, and W. R. Fertig, for appellants.

T. J. Kane and T. P. Davis, for appellee.

ELLIOTT, J. Petition for partition by the appellee, wherein she asserted title to one-third of certain real estate, alleging that she derived title as the widow of her deceased husband, John Wiseman, and averring that the defendants claimed title by devise from their father, the said John Wiseman, deceased.

The appellants answered in four paragraphs, the first of which was a general denial, and the others pleaded affirmative matter in confession and avoidance. To all but the first paragraph demurrers were sustained, and of this ruling the appellants first complain.

It is not necessary to state with much particularity the facts pleaded, for the question of law arising upon the answer may be fully stated and clearly comprehended from a brief synopsis of the facts pleaded by the appellants. The second paragraph charges that the appellee wrongfully abandoned her husband; that after such abandonment the husband went to Pennsylvania, whither the wife had fled, and endeavored to persuade her to again live with

*To same effect, *Elder v. Reel* (62 Penn. St. 306), 1 Am. Rep. 414.

him; that she refused, cruelly treated him, and caused him to be cast into prison; that she extorted from him a written contract, and that all the property of which the appellants' father died seized has been acquired since the execution of said contract and while the appellee was living apart from her husband. The written agreement is made part of the answer, and is substantially a contract of separation, wherein the husband releases to the wife certain property then owned by the wife, as well as that which she may afterward acquire, and also transfers to her a certain bond. There is however no provision that the said Sarah shall relinquish any rights in or to the property of her husband. The third paragraph of the answer avers wrongful abandonment and concealment of residence, by the appellee, from her husband for more than forty-eight years. The fourth paragraph combines the material allegations of the second and third, and goes more into detail.

One general rule determines the question of the sufficiency of all these answers, and that rule, shortly stated, is: Under our statute, a surviving wife, who has not conveyed or relinquished her interest in the property of the husband, or accepted a jointure, or received a valid ante-nuptial settlement, can be deprived of her rights in the lands of her deceased husband for one cause, and for one cause only, and that is the cause prescribed in the thirty-second section of the statute of descents, 1 R. S. 1876, p. 413. The right of a surviving wife can only be defeated by showing that at the time of the husband's death she was living apart from him in adultery. *Shaffer v. Richardson's Adm'r*, 27 Ind. 122. Our statute is imperative, its words are mandatory; the surviving wife shall take an interest in the lands of the deceased husband. The only cause which will bar this right is the one just named. It is useless for counsel, and it would be equally so for the court, to expatiate upon the injustice of a rule which will allow a wife who has lived apart from her husband for nearly half a century to come in at his death and seize one-third of the property accumulated by him during the time she lived in concealment from him. With the legislature such an argument might have weight; with us it can have none. An all-sufficient answer from us is, "*Ita lex scripta est.*"

A woman who has been divorced from her husband cannot, of course, be deemed a surviving wife, but unless there has been a judicial decree, dissolving the marital relation, the wife who outlives her husband is the surviving wife, no matter how bad her conduct

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may have been. This was the doctrine of the common law and is thus well stated by Chancellor KENT: "If there be no statute regulation in the case, the principle of the common law, and not only of England, but of the Christian world, is, that no length of time or absence, and nothing but death, or the decree of a court confessedly competent to try the case, can dissolve the marital tie." 2 Kent Com. 80; *Roche v. Washington*, 19 Ind. 53.

[But on another point]

Judgment reversed, at costs of appellee, with instructions to sustain appellants' motion for a new trial.

Petition for a rehearing overruled.

STATE V. BERDETTA.

(73 Ind. 185.)

Criminal law—nuisance—obstruction of sidewalk.

A fruit stand, a permanent structure, materially encroaching on a sidewalk of a public street in a thickly inhabited part of a city, is an indictable nuisance, whether it essentially interferes with the comfortable enjoyment of the sidewalk or not. (See note, p. 127.)

INDICTMENT for nuisance. The opinion states the case. The defendant was acquitted below.

J. B. Elam, prosecuting attorney, *J. M. Cropsey* and *C. M. Cooper*, for the State.

J. L. Mitchell, for appellee.

ELLIOTT, J. This appeal is prosecuted by the State from a judgment acquitting the appellee of the offense of maintaining a public nuisance. The State seeks a review of the ruling of the court in refusing an instruction asked by the prosecuting attorney, and upon the question whether that ruling was correct or not the case turns.

The instruction asked by the State and refused by the court reads as follows: "If it is shown by the evidence beyond a reasonable doubt that Market street and the sidewalk thereof is situated in the

city of Indianapolis, Marion county, Indiana, in a densely populated neighborhood, and constantly used by the citizens of said State for the purpose of passage and repassage as a public highway, and was so situated and used on the 12th day of May, 1880, and the defendant on that day was occupying and maintaining on said sidewalk a building of a permanent nature, of the length of twenty-three feet, and of the width of three feet eleven inches, and of the height of seven feet, and that said sidewalk was fifteen feet wide, except where said building was situated, and that where said building was situated but eleven feet remained for the passage of said citizens of said State, you should find the defendant guilty, such an obstruction of a public highway being a nuisance within itself." Although this instruction was refused by the court, yet upon its own motion, one was given precisely the same, except that the last clause was omitted, and the following clause substituted: "And that the obstruction essentially interfered with the comfortable enjoyment of said sidewalk." The effect of this striking out and substitution was to very materially change the meaning and force of the instruction. The theory of the instruction, as originally written, is very different from that asserted by the instruction as framed by the court. The instruction asked by the prosecution asserts that it is sufficient for the State to prove the existence of a permanent obstruction in the highway, while that framed by the court affirms that it is not sufficient to show the existence of such an obstruction, but that the State must show, in addition, that "it essentially interfered with the comfortable enjoyment of the sidewalk."

A public street is a public highway, and a sidewalk is a part of the street. *Common Council v. Croas*, 7 Ind. 9; *State v. Mathis*, 21 Ind. 277. The common-law doctrine was that a public highway was a "way common and free to all the king's subjects to pass and repass at liberty," and that an unauthorized obstruction was indictable and punishable as a nuisance. Nor was it necessary to show any thing more than that there was a permanent obstruction of the public way. *Pepole v. Vanderbilt*, 28 N. Y. 396; *State v. Woodward*, 23 Vt. 92; *Davis v. Mayor*, 14 N. Y. 506, 524; *Commonwealth v. King*, 13 Metc. 115; *Harrow v. State*, 1 Greene (La.), 439.

Counsel for appellee argue with much force and ingenuity that the common-law doctrine does not prevail in Indiana, for the reason that our statute prescribes an essentially different rule. It is indeed true, as counsel assert, that we have no common-law offenses,

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and that criminal prosecutions can only be maintained for such offenses as are prescribed by statute. It does not however follow from this that there is no such thing as an indictable public nuisance under our statute. In *Burk v. State*, 27 Ind. 430, it was held that there is such an offense, although the statute does not specifically define a public nuisance. In that case it was held that "the phrase 'public nuisance' had a very definite meaning in the law long before the statute was enacted." If the case cited should be followed to its logical consequences, it would require us to hold that what was at common law a public nuisance is such under our statute, and that permanently obstructing a highway is *per se* a public nuisance, because it was always such at common law. We hold this to be the correct ruling.

Upon the assumption of the appellee, that the State must show an unlawful act injurious to the citizens of the State, and one which essentially interferes with either the free use of property or the comfortable enjoyment of life or property, the conclusion which he deduces is an incorrect one. The permanent obstruction of a public street is in itself an unlawful act, essentially interfering with the free use of property, as well as the comfortable enjoyment of life. The right of adjacent proprietors in and to the highway is one of which the legislature itself cannot deprive them without compensation; nor can the municipal authorities, broad and comprehensive as their powers are, devote the street to private purposes. *Haynes v. Thomas*, 7 Ind. 38; *St. Vincent O. Asylum v. City of Troy*, 76 N. Y. 108; s. c., 32 Am. Rep. 286. So far does this rule go that the municipality is itself guilty of maintaining a public nuisance, if it place a permanent obstruction in a public street. *Wartman v. City of Philadelphia*, 33 Penn. St. 202; *State v. Laverack*, 34 N. J. 201. Even under the British form of government, the king had no power to authorize the permanent obstruction of a public highway. Vin. Arb., tit. Nuisance. The existence of the permanent obstruction in the highway is therefore clearly such an unlawful act as injures the citizens who are lot-owners on the street, and who have a right, as an essential incident to the enjoyment of their property, to have the street maintained its full width, free from all obstructions of a permanent character. This is such a right as may be vindicated either by injunction or indictment, and its violation is established by evidence of a permanent encroachment upon the street. *Smith v. State*, 3 Zab. 712; *Moyamensing v. Long*,

1 Para. 143 ; Wood on Nuis., § 252 ; *Lingsdale v. Bonton*, 13 Ind. 467. It is upon the doctrine here affirmed, that the case of *Pettis v. Johnson*, 56 Ind. 139, proceeds. There this court held that a stairway erected upon a public alley of a city, by express authority of the municipal officers, was *per se* a public nuisance, which an adjacent proprietor might have abated. The same general doctrine is declared in the late and well-considered case of *Commonwealth v. Blaisdell*, 107 Mass. 234. The conclusion upon principle as well as from authority, must be, that if the unlawful act of obstructing a public highway did not injure others than those owning real estate upon the street, such unlawful act would be, of itself, a public nuisance.

Broader and more comprehensive rights than those of adjacent proprietors, as well as a far more numerous class of citizens than those owning lots abutting on the street, are however injuriously affected by the unlawful obstruction of a public highway. All the citizens are affected, for "a highway," to adopt one of the definitions found in the books, "is a road which every citizen has a right to use." The right to pass and repass upon a public highway is not restricted to any part, for "the public are entitled, not only to a free passage along the highway, but to a free passage along any portion of it not in the actual use of some other traveller." 1 Hawk. P. C., ch. 32, § 11 ; Ang. Highw., § 226. The same doctrine is declared by this court in *City of Indianapolis v. Gaston*, 58 Ind. 224, where it is held that the entire width of a sidewalk must be maintained convenient and safe for the use of travellers. In *Sherlock v. Bainbridge*, 41 Ind. 35 ; s. c., 13 Am. Rep. 302, the same general principle is explicitly affirmed. The question, in all cases of the character of the present, is not whether travel was actually interfered with, but whether there was an unlawful encroachment upon a public street by the erection of a permanent obstruction.

The citizens of the municipality who are invested with the local government are all affected by the obstruction of a street, because all, in the capacity of tax payers, are charged with the burden of so keeping the streets as that they may be used in safety by the citizens of the State. So far does the law upon this subject extend that even though the obstruction be placed on the street by a wrong-doer, the municipality may, under some circumstances, be liable for any injuries which may be caused by such an obstruction. It cannot be doubted, that in keeping the streets clear and free

from obstructions, all the tax payers of a municipality are interested, and therefore the obstruction of a street necessarily affects a very great number of the citizens of the State. In three different capacities therefore are the citizens affected by the permanent obstruction of a public street, as adjacent owners, as tax payers, and as citizens, having a right to use all of the public sidewalk not in the actual use of some other traveller.

Upon the facts hypothetically stated in the instruction, the rule of law must be that the obstruction is *per se* a nuisance, or we might have on the same street, indeed on the same square, an obstruction pronounced by one jury to be a nuisance, and another, of the same character and dimensions, by another jury, declared not to be a nuisance. If any other rule than that insisted upon by the State is declared to be the law, then each particular case, although the facts should be identically the same, might be differently decided, the result in each case depending upon the peculiar views of the jury trying the cause. The only just and safe rule is, that a permanent structure, materially encroaching upon a public street, in a thickly inhabited part of a large city, is a nuisance of itself. There is no injustice in this rule, because no doctrine is more reasonable or more firmly settled than that the streets of a city are for the use of the public, and that no one can have a right to permanently divert a street, or any part of a street, to private purposes; and one who does so divert a street ought not to be permitted to compel the State to show specifically that the enjoyment, life or property of some part of the citizens was essentially interfered with. The necessary consequence of the unlawful act is to essentially interfere with the enjoyment of life and property, and this being so, it was the duty of the court to instruct the jury, as matter of law, that an obstruction of the character described in the State's instruction was of itself a nuisance. If it be the law, as it unquestionably is, that an unlawful encroachment upon a public highway, by the erection of a structure of a permanent character, in a populous part of a large city, is an act injuriously affecting all the abutters, tax payers, and indeed all citizens of the State, there is no reason for instructing that the State must supplement the evidence of the character and location of the obstruction with evidence showing that it interferes with the comfortable enjoyment of the sidewalk.

The character and location of the obstruction being shown, it

was the duty of the court to have told the jury, as a matter of law, that such an obstruction was a public nuisance. Unless the conclusion from the existence of the facts be deemed and treated as matter of law, the result will be a line of cases with precisely the same facts, but with diverse judgments, varying with the views of the jury by which each case is tried. The rule which must guide is one of law, and should be declared by the court; and as the rule of law was correctly expressed in the instruction asked, it should have been given.

The instruction given by the court was of such a character as to convey to a man of ordinary capacity an incorrect view of the law applicable to the case. As we have already shown, the rule at common law is, beyond all question, that a permanent and material encroachment upon a public street is *per se* a nuisance, and as we have further shown, our statute does not change that rule, it must be held error to so instruct the jury as to lead them to believe that in addition to showing the character, situation and surroundings of the obstruction, it was necessary for the State to show that the comfortable enjoyment of the sidewalk was essentially interfered with. But one interference can be drawn from the instruction of the court, and that is that there must be some other facts shown in addition to those stated in the instruction. Having hypothetically stated all the facts which it was incumbent upon the State to prove, the last clause of the instruction, reading as follows: "and that said obstruction essentially interfered with the comfortable use of the sidewalk," is added, thus conveying to the jury the impression that something more than the facts recited in the instruction must be proved. If the facts stated in the part of the instruction preceding the clause just quoted were all that the State need prove, then by adding that clause an erroneous rule was declared, because that clause asserts, that in addition to the facts recited, the State must show some other fact or facts.

. The distinction between the temporary occupancy of public streets for commercial or building purposes, and their permanent obstruction, is well illustrated in the leading case of *Wood v. Mears*, 12 Ind. 515. It is not doubted that sidewalks may, when authorized, be temporarily occupied for private purposes; but temporary occupancy for authorized private purposes is quite a different thing from the erection of a structure of a permanent character. But even with respect to temporary use of such streets, it must be borne

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in mind that it may go to the extent of becoming a public nuisance. *Rex v. Russell*, 6 East, 427; *Commonwealth v. Passmore*, 1 S. & R. 217; *Palmer v. Silverthorn*, 32 Penn. St. 65; *Commonwealth v. Millinan*, 13 S. & R. 403.

Appeal sustained, at costs of appellee.

ON PETITION FOR A REHEARING.

ELLIOTT, J. The importance of the questions involved, and the earnestness and ability with which the petition for a rehearing has been argued, have induced us to again carefully consider the questions which this case presents.

We are satisfied that the conclusions reached and announced in the original opinion are correct. Public highways belong, from side to side and end to end, to the public. If acquired under the right of eminent domain, the public money paid for them. If acquired by dedication, the donor gave them to the public for public purposes. The right to seize lands, under the right of eminent domain, extends only to cases where the highway is for the public use. *Blackman v. Halves*, 72 Ind. 515. There is no such thing as a rightful private permanent use of public highways. If one person can permanently use the highway for his private business purposes, so may all. Once the right is granted, there can be no distinction made, no line drawn; all persons may build their shops, exhibit and sell their wares, within the boundaries of the public highway. There is no right in any person to permanently appropriate to private use any part of a public street or alley. The person who so uses a public highway commits an indictable public nuisance. An English author of deservedly high repute illustrates the doctrine we are endeavoring to enforce, thus: "In the case of an ordinary highway running between fences, the right of way or passage is *prima facie*, and unless there be evidence to the contrary, extends to the whole space between the fences, and the public are entitled to the use of the whole of it as the highway, and are not confined to the part which may be metalled or kept in order for the more convenient use of carriages and passengers. It is an indictable offense, therefore, to place posts on greensward and open places extending between the metalled part of the road and the fence, dividing the road from the adjoining land, although the posts do not in point of fact offer any injurious obstruction to the public traffic. It is enough that they stand in the way of those who may

wish to traverse the whole space between the fences." 1 Add. Torts, p. 328, § 313.

In *Commonwealth v. Wentworth*, 1 Brightly N. P. 318, the facts were precisely similar to those stated in the instructions asked by the State in the case in hand, and the court, as matter of law, declared the act of placing a fruit-stand upon the sidewalk of a city to be a public nuisance.

The accurate and learned editor of the Albany Law Journal declares that "There is nothing novel in the doctrine that the citizens have a right to a clear sidewalk," and that fruit-stands, even when placed thereon by authority of the municipal legislatures, are nuisances.

We deem it unnecessary to add other citations to those made in the original opinion, although many more might be added.

There was no usurpation of the functions of the jury in the instruction asked by the State. Matters of fact are always to be decided by the jury, but when the facts are entirely undisputed, it is the duty of the court to state to the jury the law upon the facts. This is true in criminal prosecutions as well as civil actions. The statute makes it the imperative duty of the court to instruct the jury upon all matters of law in criminal prosecutions, and if, in giving instructions, an error is committed, the case will be reversed. It is none the less the duty of the court to instruct the jury upon the law, because the jury are the ultimate and exclusive judges of both the law and the facts. The jury are not, according to the settled rule of this State, bound to obey the instructions given them, but the court is nevertheless bound to inform them upon all matters of law. In this case, the facts hypothetically stated in the instruction were all that were required to constitute a public nuisance. Not a single material fact was wanting, and it was proper to state the rule of law applicable to such facts. Courts are not to state mere abstract propositions of law, but to state rules applying to the particular case on trial. In this case the right of the public, the invasion of that right by the wrongful act of the appellee, and the injury to the public, all appeared in the hypothetical statement made by the court, and nothing remained but to do as the State asked the court to do — declare the rule of law applicable to such a state of facts.

Appellee refers us to the case of *State v. Johnson*, 69 Ind. 85, where it was held that an indictment attempting to charge the of-

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fense of living together in open and notorious fornication was bad because it did not aver that the living together in fornication was open and notorious. The doctrine of that case we heartily approve, but fail to see that it has the slightest application to the case we have in hand. We are also referred to the case of *State v. Houck*, 73 Ind. 37. It was there held that an information which charged that a slaughter-house that was so maintained as to emit offensive and noisome stenches and smells around it for the distance of one-fourth of a mile, was bad for the reason that it did not aver that there were persons living within that distance. It was there said: "Nor does it appear, by the affidavit, that any one resided within the limits of the quarter of a mile, to which extent the air was contaminated. * * * In short, no facts are stated to show that any part of the citizens of the State were injured. The general conclusion, 'to the great injury, annoyance and common nuisance of all the citizens of the State,' etc., does not supply the defect in the main body of the allegation." That case, so far from being in appellee's favor, is against him, for it decides that the facts, and not the mere conclusions, are to control. In the case in hand, all the material facts appear, and the court was asked to declare the law upon these undisputed facts.

The only other case to which counsel refer is the overruled case of *Hackney v. State*, 8 Ind. 494. All we need say of that case is, that the doctrine which it declared has been completely exploded. *Wall v. State*, 23 id. 150; *Burk v. State*, 27 id. 430; *Ohio, etc., R. W. Co. v. Simon*, 40 id. 278; *Pettis v. Johnson*, 56 id. 139; *Hood v. State*, 56 id. 263; s. c., 26 Am. Rep. 21; *Haag v. Board, etc.*, 60 Ind. 511. Many of these cases, and more that might be cited, hold that, under our statute, a nuisance is substantially the same as at common law. The law upon this subject is well stated by FRAZER, J., in *Burk v. State, supra*. It was there said: "There is no difficulty in understanding the section of the statute upon which this prosecution was founded. The phrase 'public nuisance' had a very definite meaning in the law long before the statute was enacted. To annex a definition of each word employed in the section was certainly never within the purpose of the legislature. Such absurdity is not to be imputed to the law-making power. Was it then intended that in creating a crime, words having a comprehensive and exact legal meaning, embracing much in brief, must not be employed; that the virtue of such legislation should depend

upon the vastness of its circumlocution? It is hardly conceivable that any thing more was intended than that there should be no criminal prosecution in this State for any act, unless the legislature had first declared it a crime, in intelligible terms, and fixed the punishment therefor. In that sense, the enactment against public nuisances is consistent with it. It defines — i. e., marks out with distinctness, a public nuisance as a crime.”

Much is said by counsel about the necessity of supplementing the facts stated in the instruction by evidence that some injury was done to some particular citizen or citizens. It is evident that counsel lose sight entirely of the principle which governs this case. Although at the expense of some repetition, we restate this principle. The public were entitled to the free use of every part of the sidewalk, and the erection of a permanent structure thereon was an invasion of this right, constituting a legal injury affecting not only some, but all, of the citizens of the State. The act is itself a wrong, and in and of itself a wrong to all the citizens of the Commonwealth. There is no need to call this or that citizen and ask him whether he has suffered any annoyance. This would be impracticable as well as needless, because the act itself affects all who have a right to travel the highway, and that right belongs to everybody in the State. It is impossible to invade it without affecting the interests of all.

We are told that numerous encroachments have been made upon public sidewalks by stairways, basement railings and the like, under the belief that such encroachments are not nuisances *per se*. We cannot say what belief persons may act upon in appropriating public property, but we can say that there can be no reasonable foundation for a belief that one may seize upon the property of another and appropriate it to his own use, even though that other be the public. There is not the semblance of a ground upon which to found such a belief. Men certainly know that they do not own an inch of the public way, and know, too, that the way belongs to the public, and is free and common as a way to every citizen of the land. Surely no man can justly claim that he can seize the public sidewalks of a large city, and build thereon permanent structures for private use. But more than this, he who does seize a part of the public highway for private purposes knows — not merely as matter of law, and that is conclusive knowledge, but as matter of fact — that he is invading the rights of all the citizens of the

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State; for all have a right to the free use of every part of the highway.

Petition overruled.

NOTE BY THE REPORTER.—There can be no doubt that the public have a right to a clear highway throughout its whole width. Thus, in *Davis v. Mayor*, 14 N. Y. 594, it is said: "Any permanent or habitual obstruction in a public street or highway is an indictable nuisance, although there be room enough left for carriages to pass." So of stones, etc., placed on the untraveled part of the highway. *Com. v. King*, 18 Metc. 115. So of steps projecting into and obstructing the highway. *Com. v. Blaisdell*, 107 Mass. 384.

In *Reg. v. United Kingdom Telegraph Co.*, 81 L. J. M. C., 167 where telegraph poles on the outer edge of a highway were held nuisances, the court said: "It is enough that the posts stand in the way of those who may choose to go there." In *King v. Wright*, 3 B. & Ad. 681, it is said: "I am strongly of the opinion, when I see a space of fifty or sixty feet through which a road passes between inclosures set out under act of Parliament, that unless the contrary be shown, the public are entitled to the whole of that space, although from motives of economy perhaps the whole of it has not been kept in repair." See also *Rez v. Lord Grosvenor*, 3 Stark. 448; *Queen v. Betts*, 16 Q. B. 1022, where it is held that "any permanent or habitual obstruction in a public street or highway is an indictable nuisance, although there be room enough left for carriages to pass."

The street or sidewalk cannot be habitually used for business purposes, such as the delivery of distillery slops through pipes. *People v. Cunningham*, 1 Den. 594; or for wagons continually standing to receive goods, *King v. Russell*, 6 East, 427; or for sawing timber, *Rez v. Jones*, 3 Camp. 280; or for receiving barrels from a cider press, *Dennis v. Stippery*, 17 Hun. 69. These cases speak of a continuous and unreasonably obstructive use. A temporary and necessary use, such as the delivery of barrels from wagons on skids across the sidewalk, is permissible, provided a sufficient space is left on the other side of the roadway. *Mathews v. Kelsey*, 58 Me. 53. In *Goldsmith v. Jones*, 48 How. Pr. 415, the plaintiffs, who occupied a store adjoining the defendant's, built a box around a telegraph pole, projecting two and a half feet on the sidewalk, using it as a sign; the defendant obliterated the names on the box; *held*, a malicious trespass. The court say the only allowable act of abating would be the removal of the box, and this could not be justified unless it specially incommoded the defendant's use of the street or sidewalk. A man has no right to stand on the sidewalk in front of a house five minutes and use abusive language toward the owner, *Adams v. Rivers*, 11 Barb. 390; nor warn the public from another's shop, as with a placard inscribed, "beware of mock auctions." *Gilbert v. Mickle*, 4 Sandf. Ch. 267. Nor has he any right to display such goods or signs in his shop or its windows, as to collect a constant crowd on the sidewalk, obstructing public travel, as, for example, satirical effigies, *Rez v. Carille*, 6 C. & P. 633; but in *Barling v. West*, 29 Wis. 807; s. c., 9 Am. Rep. 576, where the municipal law required fourteen feet in width of sidewalk, with the outer ten feet clear of obstructions, and a man put a lemonade stand within the four feet, and crowds gathered outside, obstructing the public travel, he was held justifiable. And in *Mathews v. Kelsey*, 58 Me. 53; s. c., 4 Am. Rep. 248, it was held that the owner of a warehouse located on a street through which a railroad runs, has the right to unload goods from cars standing on the track, by means of skids extending from the car to the warehouse, provided there is ample room to accommodate travel on the other side of the street, and the time occupied in unloading is reasonably short.

In *Turner v. Holtzman*, 54 d. 148, it was held that a stage-coach, stopping for an unreasonable time on a public highway, in front of and obstructing the entrance of a camp-meeting ground, might lawfully be "moved on" by the persons in charge of the ground. The court said: "Persons have a right to travel over public streets and roads, stopping only for necessary purposes, and then only for a reasonable time. Stage coaches may stop to set down and take up passengers, as this is necessary for the public convenience; but this must be done in a reasonable time. A person travelling on the highway must do so in such a way as not unnecessarily or unreasonably to impede the exercise of the same right by others; and if he does not exercise this right in a reasonable manner, he is guilty of a nuisance. *Rez v. Cross*, 3 Camp. 226; *Rez v. Jones*, id. 230; *People v. Cunningham*, 1 Den.

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534; Wood on Nuis., § 529. The proof in this case clearly shows that the coach of the appellee, by remaining in the highway, under the circumstances as testified to by nearly all the witnesses on both sides, obstructed the travel over it for an unreasonable time, and was a public nuisance. Without stopping to inquire whether any one whose rights are not injured or interfered with by a public nuisance may abate it, about which there is some conflict in the decisions, there can be no doubt whatever that any person whose rights are injured or interfered with may abate it, provided its abatement does not involve a breach of the peace."

In *State v. Edens*, 83 N. C. 524, the defendant was charged in a common-law indictment with a nuisance by obstructing a street in that he kept a market cart standing in the street for an hour and a half, and the jury rendered a special verdict finding that he was notified to remove the same but refused; that he and a number of other persons were accustomed to occupy places on the street with their carts, selling vegetables, etc., but that it was contrary to the municipal regulations, and that notwithstanding the alleged obstruction, there was the usual passing of vehicles and foot passengers. *Held*, not to be a nuisance *per se*. The court said: "Any permanent obstruction to a public highway, such as would be caused by the erection of a fence or building thereon is of itself a nuisance, though it should not operate as an actual obstacle to travel, or work a positive inconvenience to any one. It is an encroachment upon a public right, and as such is not permitted by the law to be done with impunity. But the very object of a highway is that it may be used, and though travel be its primary use, it still may be put to other reasonable uses; and whether a particular use of it which does not of itself amount to a nuisance is reasonable or not, is a question of fact to be judged of the jury according to the circumstances of the case. Unlike the case of a permanent obstruction just referred to, it is not the manner of using the highway which constitutes the nuisance, but the inconvenience to the public which proceeds from it, and unless such inconvenience really be its consequence, there is no offense committed. We have made careful reference to the leading English cases on this subject (which are admitted by all the authors to be *Rex v. Russell*, 6 East, 427; *Rex v. Jones*, 3 Camp. 230, and *Rex v. Cross*, id. 224), and in each and every one of them the use of the highway which was the subject of prosecution, was shown to be not such as might, but such as actually did obstruct travel therein and impair its enjoyment by the public. And so it is in every case decided by the courts of the several States, which have come under our observation, and it must needs be so, since the question as to which is a proper and reasonable use of a highway must depend in a great measure upon its locality, its accustomed usage, and the exigencies of the public, it being apparent that what would obstruct travel and work an inconvenience to the public in the crowded streets of London, or on Broadway in New York, might be harmless in the streets of a less populous place."

In *Hawkins v. Sanders*, Michigan Supreme Court, January 22, 1881, the court said: "Hawkins, who owns a hotel building in Ypsilanti, filed his bill to restrain defendant, who owns a neighboring store building, from maintaining a wooden awning in front of his premises. The complainant's theory seems to be that this is a public nuisance, which injuriously affects him specially. The awning is so far as we can see no more of a nuisance than it would have been if made of any other material, and it was not as shown from the evidence such a structure as any court would regard as a public injury or grievance. It was such as was used habitually in other parts of Ypsilanti as well as elsewhere, and was recognized by the city ordinances as not objectionable. It was therefore no more than a lawful use of defendant's own property. The special grievance complained of is simply that it obstructs the view of the sidewalk and a portion of the street. The testimony does not indicate that there was any very well-founded objection in fact to the awning, and there is no legal objection to it."

See *Cushing v. City of Boston*, 138 Mass. 330; s. c., 35 Am. Rep. 388, and note, 388.

In *Everett v. City of Council Bluffs*, 46 Iowa, 66, it was held that shade trees in a street are not a public nuisance. The court remark: "That an obstruction, whether it be a tree or something else, in a highway or street, is or may be a nuisance, there is no doubt—the statute so declares. But it must amount to an obstruction to the travelling public." To same effect, *Clark v. Dasso*, 34 Mich. 86.

As to action for obstruction to highway, see *Milaskoy v. Foster*, 6 Or. 378; s. c., 26 Am. Rep. 581, and note, 583.

EVANSVILLE GAS-LIGHT CO. V. STATE, EX REL. REITZ, AUDITOR.

(73 Ind. 219.)

Mortgage — merger in judgment.

The lien of mortgage is not merged in a judgment of foreclosure. (*See note, p. 133.*)

ACTION to revive decree of foreclosure. The opinion states the case. The plaintiff had judgment below.

A. Iglehart and J. E. Iglehart, for appellant.

W. F. Smith, T. E. Garvin and G. Palmer, for appellees.

ELLIOTT, J. The State by the auditor of Vanderburgh county as relator, prosecuted this suit against the appellant and Francis J. Reitz, and obtained judgment against the former, but not against the latter. The object of the action was to revive a decree of foreclosure upon two school-fund mortgages, which had been taken against James G. Jones and wife.

A special finding of facts was made by the court, at the request of parties, which is as follows :

[Omitting this.]

The decree of foreclosure which this proceeding sought to revive was, as appears from the special finding, rendered on the 12th day of May, 1862, and this action was not instituted until the 10th day of November, 1877, more than sixteen years afterward. The appellant insists that the lien of the decree ceased at the expiration of ten years from the date of its rendition. The argument is that the mortgage was merged in the judgment, and that as the statute limits the lien of a judgment to a period of ten years from its date, with the expiration of that period terminated the lien of the decree sought to be revived.

Appellant's chief reliance is upon section 527 of the Code, which provides, *inter alia*, that all final judgments for the recovery of money or costs shall be a lien upon real estate for ten years after the rendition thereof, and no longer. 2 R. S., 1876, p. 233. The statute in terms applies only to judgments for the recovery of

money, and does not apply to a decree of foreclosure establishing a specific mortgage lien upon real estate, and we do not think it should, by construction, be so extended as to apply to such decrees of foreclosure. Section 642 of the Code is also relied upon by the appellant. If the appellant is correct in asserting that the judgment merges both the lien of the mortgage and the cause of action evidenced by it, and that the lien of the judgment takes the place of that of the mortgage, then, under the provisions of either statute, it is entitled to a reversal.

If the decree of foreclosure, which the State obtained against Jones and wife, is to be treated as an ordinary judgment, then it must be held that the lien was lost long before this action was instituted. The controlling question therefore is, whether a decree of foreclosure is to be treated as an ordinary judgment; for if it is to be so regarded, then the appellant is clearly right.

If the judgment merged the mortgage lien, then the mortgage lien was extinguished. It will not do to assume, as a matter of course, that there was a merger, for there are many cases in which, in order to prevent injustice, courts will not allow merger to take place, although all the essential elements of a technical merger combine in the particular case. Mergers are not favored. As Chief Justice PARKER tersely said, in *Gibson v. Crehore*, 3 Pick. 475, "Mergers are odious in equity."

Nor is it clear, that where a mortgage is foreclosed, the decree "swallows" the lien of the mortgage. There are at least two very strong reasons why this cannot on principle be so: First, the mortgage lien is a specific one, the judgment a general one, and the lien of the former is therefore the superior one. The difference between mortgage and judgment liens is clearly drawn by WORDEN, J., in *Gimbel v. Stolle*, 59 Ind. 446. Second, the lien of the mortgage is superior in duration to that of the judgment. In these two essential particulars, the mortgage lien is the greater, and it would seem almost a contradiction of terms to declare that the inferior lien can swallow the greater. The whole theory of merger is that the greater estate or thing takes into itself the less, and this cannot be so where there are essential particulars in which the one alleged to be the inferior is really the superior. It can hardly be possible that even an imaginary legal entity can be conceived as capable of absorbing into itself another thing greatly larger in two very essential and prominent features.

The merger of a judgment takes up the mortgage as a cause of action, but not as a lien. There is a broad distinction between a merger of a cause of action and the merger of a lien. It is owing to error in confusing the merger of the cause of action with the merger of a lien, that some of the courts have been led into the erroneous holding that a judgment extinguishes the mortgage lien.

A suit of foreclosure is a remedy for the enforcement of a mortgage lien, and it ought not to be abridged by holding that the decree cuts down, rather than enlarges, the lien. Without a decree the lien continues for twenty years, and surely that which is meant to carry into effect this lien ought not to be allowed to have the effect of shortening the duration of the lien to a period one-half shorter than that for which it would continue without the decree. Upon principle it is, in our opinion, very clear, that although the judgment merges the mortgage as a cause of action, it does not abridge or extinguish its lien.

Although there is some conflict in the authorities, we think the weight is with the doctrine, that the decree of foreclosure does not merge the lien of the mortgage. Counsel cite us to *Freeman on Judgments*, §§ 215 and 216, but we think these sections afford appellant's theory no support. The author is speaking of the effect of a judgment upon the mortgage as a cause of action, not of its effect upon the lien created by the mortgage. There can not well be two opinions upon the proposition, that the mortgage as a cause of action is merged in the decree, and that all rights growing out of it as a right of action are merged in the judgment or decree. This however is not the point here in debate. In *People v. Beebe*, 1 Barb. 379, it was held that the lien of the mortgage was merged in the decree, and this doctrine is stated approvingly in *Gage v. Brewster*, 31 N. Y. 218. These are the only cases to which appellant has referred, and we have found no others supporting the doctrine they declare.

There are many well-considered cases holding a doctrine different from that declared by those upon which appellant relies. In our own reports, we have the case of *Lapping v. Duffy*, 47 Ind. 51, where it was held that a judgment did not extinguish the lien of the mortgage. It is true that the case just cited did not pass upon the question as here presented, but the principle enunciated is substantially the same as that which must govern the case under examination. We have also the case of *Tral v. Hinchman*, 69 Ind.

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379, where the same general doctrine is declared and enforced. In the case of *Helmhold v. Man*, 4 Whart. 410, the question was considered and decided adversely to the doctrine of the New York cases. It was there said: "The lien was created by the mortgage itself; the judgment neither added to, nor took any thing from it; and it is clear therefore that the acts of assembly, which require judgments creating liens or binding lands or real estate, to be revived every period of five years, for the purpose of continuing such liens, do not extend to or embrace the liens of mortgages, and can have no application to or bearing upon them whatever."

The rule, that the mortgage lien is not merged in the decree, is asserted by the Supreme Court of Iowa in two well-considered cases. *Stahl v. Roost*, 34 Iowa, 475; *Hendershott v. Ping*, 24 id. 134. The same rule has long since been the settled law of Missouri. *Riley's Adm'r v. McCord's Adm'r*, 21 Mo. 285. Illinois has adopted and enforced a like doctrine. *Priest v. Wheelock*, 58 Ill 114.

The rule, that the lien of the mortgage is not absorbed by the decree or judgment, is in harmony with settled general rules, while the opposite doctrine is in direct conflict with them. It is a rule of very frequent application, and upon which there is no contrariety of judicial opinion, that a mortgage lien is only extinguished by payment or release, and with this rule, the doctrine that the decree does not merge the lien of the mortgage fully harmonizes; while the opposite rule is in direct and irreconcilable hostility to it. We have already adverted to the well known rule, that as the lien of the mortgage is specific, while that of the judgment is general, the former is the superior. The doctrine, for which the appellant contends, that the lien of the judgment supplants that of the mortgage, cannot be brought into harmony with the general rule just stated. There is a sharp and full conflict, but we deem it unnecessary to multiply illustrations. It is obvious that appellant's theory jars and conflicts with many settled principles; while the opposite theory agrees and harmonizes with all the great rules of law, except the technical one of merger, a doctrine neither important in its practical results nor well supported by either reason or authority.

[Omitting minor points.]

Judgment affirmed.

Evansville Gas-Light Co. v. State, ex rel. Reitz, Auditor.

NOTE BY THE REPORTER — This case is the subject of a note in 30 Am. L. Reg. (N. S.), 681. A writer in 24 Alb. L. Jour. 439, says: "Would not the Supreme Court of Indiana have got at the question by a shorter cut, and in the proper way, if it had recognized what has, time out of mind, been a conceded qualification of the doctrine of merger or extinguishment, as applied to a judgment and decree of foreclosure, viz., that it shall not put rights on a less firm and enduring footing than they stood before resort was had to legal procedure? With all due deference to the Supreme Court of Indiana, and to the industry it has displayed in reaching by logic of its own a conclusion which an elementary principle establishes beyond all doubt, we venture to assert that no adjudged case which the court cites in that opinion can, when rightly interpreted, be claimed to deny, and that it will be difficult if not impossible to find any adjudged case that so interpreted can be claimed to deny, the proposition that when a mortgage has once achieved the footing of a specific lien it adheres to that footing in so far as any rights in the mortgaged premises conferred by it as such come in question, no matter whether the benefit of those rights is claimed by the plaintiff in a judgment and decree of foreclosure taken thereon, or by the holder of a title to the mortgaged premises which has come through a sale of the same under such judgment and decree of foreclosure. In other words, we assert it as elementary, that equity in the exercise of its protective office so limits and qualifies the merger of a mortgage and its accompanying debt in a judgment and decree of foreclosure taken thereon, as that such merger shall not be the means of rendering any claim to the mortgaged premises adverse to that of the plaintiff in such judgment and decree of foreclosure, or to that of any purchaser at a judicial sale had thereunder, any better or stronger than it was when, or would be if the mortgage and its accompanying debt were, on their original footing as an outstanding debt and mortgage; and to that end and within that limitation equity clothes the plaintiff and his privies, or the purchaser and his privies, as the case may be, with whatever armor the holder of the mortgage and its accompanying debt would, in virtue thereof, have had against such adverse claim, had a judgment and decree of foreclosure never been taken."

Another writer in 24 Alb. L. Jour., p. 490, says of this case: "So far as the decision had any concern with the litigants, the conclusion thus reached was unquestionably the right one. But the more we think of the court's method of reaching the conclusion the more we are convinced that the court mistakes the mere use of phrases for the expression of ideas. When a judgment is the thing that is merged, it will be proper to look for sense in the phrase 'the merger of a judgment.' But let that pass. The court speaks of the mortgage as something existing in two entirely separate and distinct characters, viz. (a), 'as a cause of action,' and (b) 'as a lien;' and while it is idle to speak of the mortgage 'as a lien,' without meaning a lien that is enforceable by action, yet according to the court, 'all rights growing out of' the mortgage 'as a right of action are merged in the judgment or decree.' Possibly the court, in speaking of the mortgage 'as a cause of action,' and in speaking of 'all rights growing out of it as a right of action,' had an idea of the remedial right which in general belongs to the holder of the mortgage for its enforcement as a subsisting charge on specific property. Possibly it had an idea of the remedial right which in general belongs to the holder of the mortgage for the enforcement of the debt for which the mortgage, as such charge, is a security. But whichever remedial right it was, the court is clearly of opinion that it is a remedial right which the 'merger of the judgment' the court is talking about incontinently 'takes up.' After all, it remains to be seen how the mortgage, which the court is clearly of opinion 'the merger of a judgment' does not take up 'as a lien,' is to be made of much practical avail after 'the merger of a judgment' has taken it up 'as a cause of action,' together with 'all rights growing out of it as a right of action.' We fear the 'broad distinction between the merger of a cause of action and the merger of a lien,' on which the Supreme Court of Indiana would fain enlighten 'some of the courts,' is a mare's nest — only that, and nothing more."

Mr. Austin Abbott, in the New York *Daily Register*, makes the following comments on the principal case: "One of the most curious instances of the perplexity to which a strictly logical dealing with abstractions will lead those who do not look at the substance of things, and try to reason out the law without a consciousness of the facts of affairs to which their reasoning is to be applied, is afforded by the cases on the vexed question whether the foreclosure of a mortgage merges the lien in the judgment. Dealing with the generalizations of the law as if they were the facts, instead of regarding them merely as

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convenient nomenclature representing the facts, many authorities are led to argue thus: a merger is a lien constituting a chose in action; a judgment or decree merges the cause of action on which it was recovered; a judgment in foreclosure therefore merges the mortgage on which the action was brought; judgments take effect according to their priority in point of time; therefore he who recovers a judgment of foreclosure accepts a later lien at the risk of letting intermediate judgments take priority. The logic may be good but the conclusion is ludicrous, and is at once seen to be so when we reason upon the things themselves. A mortgage is in form a conveyance of the entire title of the mortgagor. Equity however withholds from the mortgagee the right of possession and ownership as long as there is no default in the mortgage, and compels him to be content with what is called a lien; and this lien is the right, upon default in conditions, to claim the full benefit of the conveyance expressed in the mortgage. Formerly, when default occurred, the mortgagee was allowed to take possession at once under the mortgage, which then became a conveyance of the title relating back to its date. Our law now however requires that he should apply to a court of equity, not for the purpose of cutting off the mortgage and selling the land under the judgment as land is sold under execution, but for the purpose of establishing the mortgage and cutting off the equity of redemption and the rights of all intermediate claimants. The decree of foreclosure does not supersede the mortgage. The mortgage remains upon the record and is itself the foundation of the decree, and it is the title which was pledged by the mortgage, thus freed from subsequent incumbrances, which the court sells. Foreclosure starts with the mortgage and trims off all later encumbrances. To regard it as an execution sale intended to prune off the mortgage, is to reverse the legal fact and imagine the less can include the greater. The legal fact involved in a decree of foreclosure, so far as the title to the land is concerned, is that the court lays hold of the title which was in the mortgagor at the time of the mortgage, and which was expressed to be conveyed thereby, cuts off all later incumbrances that are made parties, and transfers the disincumbered right and title to the highest bidder. The decree merges the cause of action for foreclosure, just as a decree for a specific performance merges the cause of action for specific performance, and in neither case can the plaintiff bring a second action; but it does not merge the title to the land in the foreclosure case, any more than in the action for specific performance; on the contrary, it is that title which the law is called upon to examine, discern, establish, confirm and protect against subsequent impairments. See numerous cases collected in 20 Am. L. Reg. (N. S.), 681, forming a very considerable fog bank which ought not to obscure this subject."

OHIO AND MISSISSIPPI RAILWAY COMPANY V. COLLARN.

(73 Ind. 361.)

Master and servant — negligence—known violation of master's rules by co-servant.

An employee of a railroad company was injured by one of its locomotive engines, owing to the negligence or incompetence of the fireman, who against the rules of the company had been temporarily left in charge of the engine by the engineer. The master mechanic of the company, whose duty it was to employ and discharge the engineers and firemen, knew that the engineers generally were in the habit of so leaving their engines. *Held*, that the company was liable for the injury.

ACTION by servant against master for personal injury by negligence. The head-note and opinion show the facts. The plaintiff had judgment below.

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C. A. Beecher and E. C. Devore, for appellant.

J. L. Brown, S. H. Buskirk, R. Hill and J. W. Nichol, for appellee.

WORDEN, J. [Omitting minor questions and statement.] Applying the law to the case made by the evidence, we may observe, that while a railroad company is not responsible to one employee for an injury resulting from the mere negligence or incompetence of a co-employee, in the same general employment, it is liable, in such case, where the company has been guilty of negligence, in the employment of, or, after notice, continuing in employment the negligent or incompetent employee, thereby conducing to the injury.

In the case of *Chicago, etc., Ry. Co. v. Harney*, 28 Ind. 28, this court said, speaking by FRAZER, J.: "Then again, a master ought to be bound to all the world to employ none but competent and trustworthy servants, so far as reasonable care in their selection can accomplish that end; and if he fails in this, knowing the incompetency or carelessness of those whom he takes into his service, he ought to answer to his other servants for the consequences which may result to them. See also, *Thayer v. St. Louis, etc., R. Co.*, 22 Ind. 26; *Pittsburgh, etc., Ry. Co. v. Ruby*, 38 id. 294; s. c., 10 Am. Rep. 111. The rule, to which numerous authorities are cited, is thus stated in 2 Thomp. Neg., p. 974, § 4 (2): "If the master has failed to exercise ordinary or reasonable care in the selection of his servants, in consequence of which he has in his employ a servant, who by reason of habitual drunkenness, negligence, or other vicious habits, or by reason of want of the requisite skill to discharge the duties which he is employed to perform, or for any other cause, is unfit for the service in which he is engaged, and if in consequence of such unfitness an injury happens to another servant, the master must answer for the damages suffered by such servant."

There is some discrepancy in the cases, as to when negligence is a question of law, when of fact, and when compounded of law and fact. The subject is very well elucidated in the case of *Railroad Company v. Stout*, 17 Wall. 657. There a child of the age of six years had wandered upon the road of the company, and had got his foot crushed by a turn-table which had been left unsecured and unguarded. He recovered a judgment of \$7,500 in the Circuit

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Court for the district of Nebraska, which was affirmed by the Supreme Court. Mr. Justice HUNT, in delivering the opinion of the court, said upon the subject above mentioned: "It is true, in many cases, that where the facts are undisputed the effect of them is for the judgment of the court, and not for the decision of the jury. This is true in that class of cases where the existence of such facts come in question rather than where deductions or inferences are to be made from the facts. If a deed be given in evidence, a contract proven, or its breach testified to, the existence of such deed, contract, or breach, there being nothing in derogation of the evidence, is no doubt to be ruled as a question of law. In some cases, too, the necessary inference from the proof is so certain that it may be ruled as a question of law. If a sane man voluntarily throws himself in contact with a passing engine, there being nothing to counteract the effect of this action, it may be ruled as a matter of law that the injury to him resulted from his own fault, and that no action can be sustained by him or his representatives. So if a coach-driver intentionally drives within a few inches of a precipice, and an accident happens, negligence may be ruled as a question of law. On the other hand, if he had placed a suitable distance between his coach and the precipice, but by the breaking of a rein or an axle, which could not have been anticipated, an injury occurred, it might be ruled as a question of law that there was no negligence and no liability. But these are extreme cases. The range between them is almost infinite in variety and extent. It is in relation to these intermediate cases that the opposite rule prevails. Upon the facts proven in such cases, it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed; another man equally sensible and equally impartial would infer that proper care had been used, and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average

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judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge. In no class of cases can this practical experience be more wisely applied than in that we are considering. We find, accordingly, although not uniform or harmonious, that the authorities justify us in holding, in the case before us, that although the facts are undisputed it is for the jury and not for the judge to determine whether proper care was given, or whether they establish negligence."

If the case before us had gone to the jury, that body would have been authorized to determine, under proper instructions if required, as matters of fact, whether, under the circumstances, the plaintiff was himself free from negligence contributing to his injury, and also whether the defendant was guilty of the negligence imputed to it.

The court, on the demurrer to the evidence, was bound to take, as true, all the facts which the evidence tended to prove, and such inferences from them as the jury might fairly have drawn, though the jury might not have drawn such inferences.

[Omitting question of contributory negligence.]

It needs no argument to show that the engineer was guilty of negligence and a violation of his duty, in placing his engine in the hands of a fireman, and one incompetent to manage it, contrary to the orders of the defendant; or that the fireman was incompetent, or culpably negligent in running the engine as stated, without ringing the bell or sounding the whistle, and apparently without taking the trouble to observe whether he had a clear track, or otherwise.

Now, it may be inferred from the evidence, that the master mechanic of the defendant, whose province it was to employ and discharge engineers and firemen, had ample notice of the practice of the engineers of violating the order of the defendant, by placing their engines in the hands of the firemen; and that the practice led to the placing of the engine in question in the hands of a fireman incompetent and unfit to manage it. Yet the inference is that no stop was put to the practice, nor were any engineers discharged in consequence of it. Notice to the master mechanic, clothed by the company with such powers, was notice to the company, and his

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act in thus permitting the order to be violated, and the engineers to thus consign their engines to the firemen, must be deemed the act of the company. This view is fully sustained by the authorities.

In the case of *Pittsburgh, etc., Ry. Co. v. Ruby*, 38 Ind. 294, 322; s. c., 10 Am. Rep. 111, DOWNEY, J., speaking for the court, said: "We think that notice to an agent of a corporation, relating to any matter of which he has the management and control, is notice to the corporation, and we do not see any reason why this rule is not applicable here. * * * As it was the duty of the master of transportation to communicate all matters concerning his agency to his principal, it may be presumed that he did so. But whether he did so or not, notice to him is notice to his principal, when it relates, as is did here, to the business which he was transacting for the company. He was placed in his position that he might make himself acquainted with the conduct of those who were placed under his direction and control, and he seems to have had the power to appoint and remove, promote and degrade, those who were engaged in the business of which he had the oversight."

In *Baulec v. New York, etc., R. R. Co.*, 59 N. Y. 356; s. c., 17 Am. Rep. 325, it is said that, "when the master is a corporation, necessarily acting by and through agents, the acts of its general agents charged with the employment and discharge of servants, in the performance of that duty, must be regarded as its acts. The corporation should be regarded as constructively present in all acts performed by its general agents within the scope and range of their ordinary employment."

The case of *Harper v. Indianapolis and St. Louis R. R. Co.*, 47 Mo. 567; s. c., 4 Am. Rep. 353, was, in many of its features, much like the present. See also 2 Thomp. Neg. 1028, § 34; *Patterson v. Pittsburg, etc., R. R. Co.*, 76 Penn. St. 380; s. c., 18 Am. Rep. 412.

It is clear enough, from the evidence, that the defendant was guilty of negligence, in permitting its order, above mentioned, to be violated by its engineers, and in retaining them in its employment, after notice of their practice of abandoning their engines to the firemen, which led to placing the engine in question in the hands of a careless fireman, incompetent to manage it, whereby the injury to the plaintiff occurred. The company may well be said, in general terms, to have been careless and negligent in running the engine, by means of the careless and incompetent person thus

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placed in charge for that purpose. No error was committed in overruling the demurrer to the evidence.

[Omitting a question of damages.]

Judgment below is affirmed, with costs.

Judgment affirmed.

CAIRO AND VINCENNES RAILROAD COMPANY V. STEVENS.

(73 Ind. 278.)

Water and water-course — surface water — obstruction of.

A railroad company, having acquired a right of way, and found it necessary to raise its track above the natural surface of the land, is not bound to provide culverts or other means for the passage through the embankment of surface-water or water overflowing from a river and descending in that direction from or over the lands of the adjoining owner. (*See note, p. 144.*)

ACTION of damages for obstruction of surface-water. The opinion states the case. The plaintiff had judgment below.

S. P. Wheeler, W. H. De Wolf and S. N. Chambers, for appellant.

H. D. McMullen and D. T. Downey for appellee.

WOODS, J. This suit was commenced in the Knox Circuit Court, and the venue changed to Daviess county, where a trial was had, resulting in a judgment for the plaintiff below, from which the defendant prosecutes this appeal.

The complaint contains but one paragraph, and alleges that the plaintiff, on the 1st day of January, 1872, was, and ever since has been, the owner of certain lands therein described, situated in the lower prairie below Vincennes, containing about two hundred acres. After the description of the lands, the complaint proceeds in the following words: "And the plaintiff further avers that the defendant, in the year 1872, built and constructed a large embankment of earth and stone and gravel, ten feet high and one hundred feet wide, over and across the southern portion of the said land hereinbefore described, and that said embankment extended from the north line to said land, southwardly across said land and for a distance of ten

miles south of the south line of said land; and the plaintiff says that the natural flow and drainage of the said land was over and across the land upon which the said embankment is now constructed, and also over and across the land lying immediately south of the land herein described, and from thence across and over the land now occupied by said part of said embankment south of the land hereinbefore described; and the plaintiff says that the defendant carelessly, negligently and unskillfully built and constructed said embankment, and failed negligently and carelessly, in the construction of said embankment, to make any culvert, bridge or drain, in, through or under said embankment, whereby the water coming on the land hereinbefore described could escape, and the plaintiff says that within five years last past, the water falling upon the said real estate of the plaintiff, and the water flowing thereon from the river, and from the surrounding land, has been stopped and hindered by said embankment from flowing off of said land, and during the month of August, 1875, the water being so stopped and hindered arose to the depth of eight feet upon said land, and entirely destroyed one hundred acres of growing corn, and carried away a thousand panels of fence that inclosed said land, and that since the time of the construction of said embankment the water has continually overflowed the said land, so that the same has become almost entirely worthless, and the plaintiff says that the said embankment was and is the only cause of the water so overflowing the plaintiff's land. Wherefore the plaintiff demands judgment," etc.

The complaint proceeds on the theory that the defendant was lawfully in possession of its right of way across the land described and for the distance of ten miles southward, but whether by condemnation or by purchase is left to conjecture. The defendant was therefore guilty of no trespass in entering upon its said right of way, and in making all proper and necessary excavations and embankments for the construction of its road-bed. The gist of the complaint is in the averments that the defendant "failed negligently and carelessly, in the construction of said embankment, to make any culvert, bridge or drain, in, through, or under said embankment, whereby the water coming on the land hereinbefore described could escape, and that within five years last past the water falling upon said real estate of the plaintiff, and the water flowing thereon from the river, and from the surrounding land, has been

stopped and hindered by said embankment from flowing off," etc. No attempt is made to charge an interference with any natural water-course, but only with the flow of surface-water and waters overflowing from the river and spreading over the adjacent bottom or low lands. The question presented is therefore whether the defendant, having acquired a right of way for the construction of its railroad, and having found it necessary or expedient to raise its track above the natural surface of the land, owed any duty to the plaintiff to provide culverts or other means of passage through its embankment, for the surface-water or water overflowing from the river and descending in that direction from or over the lands of the plaintiff. If upon the facts of the complaint such duty existed, a careless and negligent breach thereof, together with actionable damages, is shown, and the complaint is good. If such duty did not exist, the complaint is not good.

Washburn, in his work on Easements and Servitudes, pp. 353 and 355, supporting himself mainly by references to writers on the civil law, says: "It may be stated as a general principle, that by the civil law, where the situation of two adjoining fields is such that the water falling or collected by melting snows, and the like, upon one, naturally descends on the other, it must be suffered by the lower one to be discharged upon his land, if desired by the owner of the upper field.

"The owner of the upper field, in such case, has a natural easement, as it is called, to have the water that falls upon his own land flow off the same upon the field below, which is charged with a corresponding servitude, in the nature of dominant and servient tenements."

This is doubtless the rule of the civil law, and has been adopted by the courts of last resort in some of the States of the Union, but it is not the common-law doctrine, and is not generally prevalent in this country.

Dillon, in his work on Municipal Corporations, speaking of the surface-water, says: "This the law very largely regards (as Lord TENTERDEN phrases it) as a common enemy, which every proprietor may fight or get rid of as best he may. * * * On the one hand, the owner of the property may take such measures as he deems expedient to keep surface-water off from him or turn it away from his premises on to the street; and on the other hand, the municipal authorities may exercise their powers in respect to the graduation,

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improvement, and repair of streets, without being liable for the consequential damages caused by surface-water to adjacent property." Section 798, and notes. To the same effect are Ang. on Water-courses, § 108; 1 Add. Torts, 105; Cooley Torts, 574; Hilliard Torts, 584; *Taylor v. Fickas*, 64 Ind. 167; s. c., 31 Am. Rep. 114; and cases cited; *Schlichter v. Phillipy*, 67 Ind. 201.

The case of *Taylor v. Fickas*, *supra*, is fully in point, and must be regarded as having settled the doctrine for this State on the subject. The facts of the case, in brief, were that the owner of the lower land had planted, near the upper line of his land, a row of trees for the purpose of keeping back the driftwood, which was accustomed to be carried on and over his land by the overflow of the Ohio river. The result, which must have been anticipated, and was therefore presumably intended, was that the driftwood, lodging against this row of trees, accumulated on the adjacent land above, and either destroyed or greatly depreciated the value thereof. It was held however that no action lay for the obstruction, and citing many of the American, and some of the English, cases on the subject, it was declared that waters percolating the soil, or contained in hidden recesses, without a known channel or course, surface-waters, and waters overflowing from contiguous streams or rivers, "fall within the maxim that a man's land extends to the center of the earth below the surface, and to the skies above;" and citing the case of *Gannon v. Hargadon*, 10 Allen, 106, the following statement of the law was adopted as our own: "The right of an owner of land to occupy and improve it in such manner and for such purposes as he may see fit, either by changing the surface or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated with reference to that of adjoining owners that an alteration in the mode of its improvement or occupation in any portion of it will cause water, which may accumulate thereon by rains and snows falling on its surface or flowing on to it over the surface of adjacent lots, either to stand in unusual quantities on other adjacent lands, or pass into and over the same in greater quantities or in other directions than they were accustomed to flow. * * * The obstruction of surface-water, or an alteration in the flow of it, affords no cause of action in behalf of a person who may suffer loss or detriment therefrom against one who does no act inconsistent with the due exercise of dominion over his own soil."

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In the more recent case of *Templeton v. Voshloe*, 72 Ind. 134; s. c., 37 Am. Rep. 150, this court held, "that the owner of the upper field may not construct drains or excavations so as to form new channels on to the lower field, nor can he collect the water of several channels and discharge it on the lower field so as to increase the *wash* upon the same. The right of the owner of the upper field to make drains on his own land is restricted to such as are required by good husbandry and the proper improvement of the surface of the ground, and as may be discharged into natural channels, without inflicting palpable and unnecessary injury on the lower field."

The court however took pains to add, that "As to where and under what circumstances, the owner of the lower field may obstruct or direct the flow of surface water which naturally descends upon his land, we need not inquire, as that question is in no way involved in the proper decision of this cause."

It is difficult to invent a formula for the statement of a rule of law which will accurately express the rule in its application to varying circumstances; and it may be that there is some verbal inconsistency in the formulas quoted from these opinions of this court, but when applied to the subject-matter of each there is no inconsistency of principle involved or expressed. The one has to do with the land-owner's conduct in guarding his possession against the encroachments of surface and flood waters from without, and the other with the discharge of such waters from his own land on to that of another. With reasonably near approximation to accuracy, it may be laid down as a general rule, that upon the boundaries of his own land, not interfering with any natural or prescriptive water-course, the owner may erect such barriers as he may deem necessary to keep off surface-water or overflowing floods coming from or across adjacent lands; and for any consequent repulsion, turning aside or heaping up of these waters to the injury of other lands, he will not be responsible; but such waters as fall in rain and snow on his land, or come thereon by surface drainage from or over contiguous lands, he must keep within his boundaries, or permit them to flow off without artificial interference, unless within the limits of his land he can turn them into a natural water-course. This is in accordance with the general principle, that such waters are a common enemy which each proprietor may fight off as he will; but once on his land, they become his property (in a qualified

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sense, of course), and the maxim applies, "*Sic utere tuo, ut alienum non laedas.*" We hold therefore that the complaint fails to show an actionable injury.

Judgment reversed, with costs and with instructions to sustain the demurrer to the complaint.

Judgment reversed.

NOTE BY THE REPORTER.—See *McCormick v. Horan*, 81 N. Y. 86; s. c. 37 Am. Rep. 479. Also see *O'Connor v. Fond du Lac Railway Company*, post. In *Darkley v. Wilcox*, New York Court of Appeals, October, 1881, the parties owned adjacent lots in a street near a village but not in the corporate limits. The natural formation of the land was such that surface-water from rain and melting snow would descend from various directions and accumulate in the street in front of the plaintiff's lot, in varying quantities, according to the nature of the season; sometimes extending quite back upon plaintiff's lot. In times of unusual amount of rain or thawing snow such accumulations were accustomed to run off over a natural depression in the surface of the land across defendant's lot and thence over the lands of others to a river. When the amount of water was small it would soak away in the ground. In 1871 defendant built a house on his lot, and filled up the lot and sidewalk in front of it about twelve inches or more. In 1875 there was an unusually large accumulation of water from melting snow and rains, in front of and about plaintiff's lot, so that the water ran into the cellar of his house, doing great damage. This was caused by the filling up of defendant's lot. There was no natural water-course over defendant's lot. Held, that plaintiff had no cause of action against defendant. In respect to the running off of surface-water, caused by rain or snow, there is "no principle which will prevent the owner of land from filling up the wet and marshy places on his own soil for its amelioration and his own advantage, because his neighbor's land is so situated as to be incommoded by it. Such a doctrine would militate against the well-settled rule that the owner of land has full dominion over the whole space above and below the surface. The dictum to this effect of DENIO, C. J., in *Goodale v. Tuttle*, 29 N. Y. 467, approved and adopted. See also *Vanderweile v. Taylor*, 65 id. 341; *Lynch v. Mayor of N. Y.*, 76 id. 60; s. c. 32 Am. Rep. 271. The civil-law rule differing from the above doctrine (Corp. Jur. Civ. 39, tit. 3, §§ 2, 3, 4, 5, Domat [Cush. ed.], 616), is followed in Pennsylvania, Illinois, California and Louisiana (Code, art. 656), and, referred to with approval in Ohio and Missouri. *Martin v. Riddle*, 26 Penn. St. 415; *Kauffman v. Gretemer*, id. 407; *Gilham v. Madison R. Co.*, 43 Ill. 481; *Gormley v. Sanford*, 52 id. 158; *Ogburn v. Connor*, 46 Cal. 346; s. c. 13 Am. Rep. 213; *Delahousaye v. Judice*, 13 La. Ann. 587; *Hays v. Hays*, 19 La. 351; *Butler v. Peck*, 16 Ohio St. 334; *Laumier v. Francis*, 23 Mo. 181. The courts of Massachusetts, New Jersey, New Hampshire and Wisconsin reject the civil-law rule and adopt the doctrine of this case. *Luther v. Winnisimmet Co.*, 9 Cush. 171; *Parke v. Newburyport*, 10 Gray, 23; *Dickinson v. Worcester*, 7 Allen, 19; *Gannon v. Hargadon*, 10 id. 106; *Dowlsby v. Spear*, 2 Vroom, 351; *Pettigrew v. Evansville*, 23 Wis. 223; s. c. 3 Am. Rep. 50; *Hoyt v. Hudson*, 27 Wis. 636; *Swett v. Cutts*, 50 N. H. 439; s. c. 9 Am. Rep. 276. In Pennsylvania the civil-law rule does not seem to apply to house lots in towns and cities. *Bents v. Armstrong*, 8 W. & S. 40. In Iowa, in *Livingston v. McDonald*, it is doubted whether the civil-law doctrine will be adopted by the common-law courts of this country. See also as to the interruption of percolating waters giving no right of action. *Acton v. Blundell*, 12 M. & W. 324; *Rawston v. Taylor*, L. R., 12 Exch. 389; *Phelps v. Nowlen*, 72 N. Y. 39; s. c. 23 Am. Rep. 98.

KING v. SUMMITT.

(73 Ind. 512.)

Negotiable instrument — oral guaranty of — statute of frauds.

An oral guaranty of the genuineness of a note and the liability of the maker to pay it, made by the holder upon a transfer of it for value, is valid.*

An oral promise to pay the debt of a minor is not within the statute of frauds.

ACTION on a promissory note. The opinion states the facts. The defendant had judgment below.

E. K. Miller, for appellant.

J. W. Buskirk and *H. C. Duncan*, for appellees.

Best, C. This suit was brought by the appellant against the appellees. His complaint consisted of two paragraphs. In the first he alleged that one James Hayden, on the 16th day of July, 1875, made his note to the appellees for \$125, and that they indorsed it to him; that at the time said Hayden made said note he was a minor, and was not liable to pay it; that the appellant, in ignorance of that fact, brought suit upon said note against said Hayden, and by reason thereof said suit was unavailing.

In the amended second he alleged that on the 16th day of July, 1875, one James Hayden made his note to the appellees for \$125, and they, in consideration of one hundred dollars to them paid by the appellant, sold and delivered to him said note, and "warranted and guaranteed to him that said note was valid and genuine, and that said James Hayden, the maker thereof, was legally liable to pay it;" that at the time said note was made said James Hayden was less than twenty-one years of age, and was in no wise liable to pay it; that the appellant, in ignorance of such fact, brought suit upon said note against said Hayden, before a justice of the peace, in the township where he resided, and by reason of such fact such suit was unavailing.

The appellee, Christian A. Summitt, filed a general plea of *non est factum* to the first, and a demurrer for want of sufficient facts to the second paragraph of the complaint.

*To same effect, *Mills v. Rich* (80 N. Y. 209), 36 Am. Rep. 615.

The court sustained the demurrer, and the appellant excepted. The appellant thereupon filed a demurrer to the answer of Summitt, which was overruled. No answer was filed by Gillespie, nor any step taken against him. The cause was submitted to the court for trial, and a general finding was made for appellees. The appellant moved for a new trial, because the decision was contrary to the law, and was not sustained by sufficient evidence. This motion was overruled, and appellant excepted. Final judgment was rendered for the appellees.

In this court the appellant has assigned the following as error: 1st. The court erred in overruling appellant's demurrer to the answer of appellees to the first paragraph of appellant's complaint. 2d. The court erred in sustaining appellees' demurrer to the second amended paragraph of appellant's complaint. 3d. The court erred in overruling appellant's motion for a new trial.

The failure of the appellant to reserve an exception to the action of the court in overruling his demurrer to the answer of appellees is a sufficient answer to the first assignment of error.

The second assignment presents the question whether or not a verbal guaranty that a note is a genuine and valid one, and its maker liable to pay it, made by the assignor to the assignee at the time of its assignment and delivery, based upon a sufficient consideration, is a valid and binding obligation? The appellees insist that it is not, for the reason that it is in contravention of the first section of the statute of frauds. 1 R. S. 1876, p. 503. That statute provides "That no action shall be brought * * * To charge any person, upon any special promise, to answer for the debt, default, or miscarriage of another."

It will be observed that this guaranty is not in terms a special promise to answer for the debt, default or miscarriage of another, nor can it be construed, as we believe, to embrace such an undertaking. It does not purport to be a promise to pay the debt for which the note was given, nor a promise that Hayden himself should pay it, but is simply a guaranty that the note is genuine, and that Hayden is bound by it; in other words, that Hayden had capacity to make it. It differs entirely from a promise to pay the debt. In such case, if the promise is valid, nothing short of payment amounts to a compliance; whereas, in this case, if the note is genuine, and Hayden had capacity to make it, the obligation is fulfilled without any payment at all; indeed, it is not broken.

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The promise to answer for the debt of another is an undertaking to do something in the futuro; whereas a guaranty that a third person is liable upon a note signed by him is no promise at all, but is rather an assurance that a certain condition of things exists. A breach of such undertaking does not depend upon the failure of the guarantor to do something in the future, but if the condition does not exist, the undertaking is broken as soon as made, and a cause of action at once accrues, whether the note has or has not matured.

Again there must be a debt as well as a promise; and if in this case there was no debt, the undertaking is not within the statute. It is averred that Hayden was a minor when he executed the note, and that he was not liable upon it. The demurrer admits this. If so, was there any debt?

It is said in Browne on Statute of Frauds, § 156, that "the liability of the party, for whom a guarantor within the statute makes himself answerable, must be a clear and ascertained legal liability, capable of being enforced against the party himself." Thus if the party be a minor or a married woman, or under any other legal disability as to forming binding contracts, it is manifest that a promise, by a third person, to answer for him or her, in a matter within the range of that disability, cannot be affected by the statute of frauds.

If the guarantee in this case contained a promise to pay the debt of Hayden, the averment that he was a minor when he executed the note took the case out of the statute. No other objection is urged, and we discover none. We think the court erred in sustaining the appellees' demurrer to this paragraph of the complaint.

PER CURIAM. It is therefore ordered, upon the foregoing opinion, that the judgment below be and is hereby in all things reversed at costs of appellees, with instructions to overrule the demurrer to the second paragraph of the complaint.

Judgment reversed.

HELMS V. WAYNE AGRICULTURAL COMPANY.

(73 Ind. 325.)

Negotiable instrument — principal and surety — forgery of principal's name.

When the name of one maker of a joint-note has been forged, another maker, although only a surety and signing in the belief that the forged name is genuine, is nevertheless bound to an innocent payee.

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ACTION on promissory notes. The opinion states the case. The plaintiff had judgment below.

R. R. Stephenson, for appellants.

W. Garver, for appellee.

WOODS, J. Suit by the appellee, against the appellants and Isaac N. Poe, begun in Hamilton county and taken by change of venue to Madison county. The appellants denied the execution of the note, and filed other special pleas, the nature of which will become apparent as we proceed. Error is assigned only upon the overruling of the motion for a new trial, and the counsel for the appellants insists only upon errors claimed to "arise out of the instructions given and refused."

The following are the instructions complained of:

"1st. This action is brought by the plaintiff on two joint promissory notes, claimed to have been issued jointly by all the defendants to the plaintiff. The defendant Poe makes no defense. The defendant Helms claims that he never executed the notes in suit, that is, he never signed them himself, nor authorized any one to sign them for him, and that he never affirmed or ratified the signature after it was so placed to said notes, in any manner whatever. The other defendant, Cardwell, claims that his co-defendant Helms' name or signature was feloniously placed to said notes, by some person not known to them, that is, the name of said Helms was forged to said notes, and that as the notes were therefore void as to Helms, he, Cardwell, was also released by said forgery, and the plaintiff ought not to recover against him, as the name of Helms was on when he signed. The said defendants also filed a joint answer, setting up that the plaintiff procured both of said defendants to execute the notes through fraud; that the notes were presented in blank, and so signed, with the agreement that they be filled up for certain sums, when the plaintiff, after the signatures were obtained, filled the blanks with different and greater sums than were agreed upon, and put a false date to said notes, making them mature sooner than by the agreement they were to fall due. Now, if these or any one of the material facts in this joint answer be proven true by a preponderance of the evidence, you should find for the said defendants; otherwise you should find for the plaintiff, unless you

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further find that Helms' name to the notes was forged, and that he never executed said notes, then he is not bound, and you should find for him, and for the plaintiff as against the other defendants; if she has proven, by a preponderance of all the testimony, that the notes were executed by the other defendants, as alleged in her complaint.

"2d. The notes in suit, being joint-notes executed by several parties, one of the names thereon being forged, they would be void as to the person whose name was forged, but valid as to the other makers, unless at the time she accepted said notes the plaintiff had knowledge of the forgery, or in some way participated in the fraud of wrongfully obtaining the said signature; but if you find that the plaintiff received and accepted said notes in good faith and without any knowledge or information that any of the signatures were not genuine or false, being innocent of any wrong, the law protects, and you should find for the plaintiff against those who did sign the notes.

"3d. Where several persons execute a joint-note, and it is delivered to and received by the payee in good faith, the parties who signed are not discharged because the name of one is forged to such note, and it makes no difference whether the forged name stands first or last on such note, for the law implies an assertion on the part of each who signs, that all the names preceding his are genuine, for it is not to be presumed that a man would affix his name to a note when the prior names were forged; and if one of two innocent persons has to lose by the wrong of a third, the law places the loss on the party who had the opportunity to avoid the wrong and did not do it, as every one ought to know when he signs a note with other signatures thereon, that all are genuine, and failing to do so, is guilty of neglect, and must bear the consequences; and if you find from the evidence in this case, that such were the facts as to said defendant Cardwell, he is liable, and you should find against him on said issue.

"4th. Where sureties sign a note, with an agreement that other persons shall sign the same before it is delivered, and the note is delivered without being signed by such other persons, it will still be binding on such as sign it, unless the payee of the note is a party to the agreement. Hence if you should find that the notes in suit were signed by the defendants Helms and Cardwell, under an agreement with the principal that other persons should sign the said notes before it should be delivered, and that it was delivered with-

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out such other signatures, to the principal in the notes, and the plaintiff knew nothing of such agreement, and was no party thereto, then it could not bind the plaintiff, and your verdict should be for the plaintiff."

The appellants also excepted to the refusal of the court to give the following instructions:

"5th. If you believe from the evidence that Isaac N. Poe signed the defendant Helms' name to the notes sued on, without the consent of Helms, then you should find for both the defendants, unless the defendant Cardwell signed the notes knowing that Helms' name was forged.

"7th. And if these notes were signed by Poe in the name of Helms, without the proper authority from Helms, then you should find for both Helms and Cardwell, if Cardwell signed in the honest belief that the signature of Helms was genuine.

"8th. And if the notes in suit were sent by the plaintiff, either filled up or not filled up, as to the amount of the same, to the defendant Poe with a request by the plaintiff for Poe to get security on them, then, for the purpose of obtaining such security, the said Poe was the agent of the plaintiff, and the plaintiff can reap no benefit by the fraudulent act or forgery of said Poe."

Verdict and judgment against both appellants.

The court committed no error in reference to these instructions, either in giving or in refusing.

The doctrine of the instructions given is expressed in the following proposition, namely: When the name of one of two or more obligors in a bond, note, or other writing obligatory, has been forged, the supposed co-obligor, though a surety only, and though he signed in the belief that the forged name was genuine, is nevertheless bound, if the payee or obligee accepted the instrument without notice of the forgery. This doctrine is supported either directly or in principle by the following authorities: *Veasie v. Willis*, 6 Gray, 90; *York County M. F. Ins. Co. v. Brooks*, 51 Me. 596; *Franklin Bank v. Stevens*, 39 id. 532; *Stoner v. Millikin*, 85 Ill. 218; *Selser v. Brock*, 3 Ohio St. 302; *Bigelow v. Comegys*, 5 id. 256; *Hagar v. Mounts*, 3 Blackf. 57; *Harter v. Moore*, 5 id. 367; *Carr v. Moore*, 2 Ind. 602; *State v. Van Pelt*, 1 id. 304; *Deardoff v. Foreman*, 24 id. 481; *State v. Pepper*, 31 id. 76; *Craig v. Hobbs*, 44 id. 363; *Brandt Suretyship*, § 358.

The appellants insist on a contrary doctrine, relying mainly for

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authoritative support upon the case of *Seeley v. People*, 27 Ill. 173. That case goes fully to the extent claimed for it, but it was confessedly decided without citation or knowledge of any supporting authority, and has recently been expressly overruled by the case of *Sloner v. Milliken*, *supra*, which, besides a citation of adjudicated cases, is supported by reasons much more satisfactory and conclusive.

Counsel have referred us to the remarks of Judge REDFIELD, in 3 Am. L. Reg. (N. S.), p. 404, in a note to *Insurance Company v. Brooks*, *supra*, wherein he says: "We confess to a strong inclination, in questions affecting specialties and simple contracts not negotiable, to favor the English rule. It seems to us that too many of the American cases, in striving to require good faith and diligence of the obligor or promisor, having quite too much overlooked the corresponding obligations on the part of the obligee. We can see no good reason why the obligee, who in accepting the bond, trusts to the representations of the principal obligor as to the execution of the instrument by the others, who are known to stand as mere sureties, should be any more entitled to screen himself from the consequences of those representations proving false, than should the obligor. The true rule in such case seems to be that each party may stand upon the facts of the case, unless he has been guilty of fraudulent misconduct. This is certainly the present English rule upon the subject, and the one which we believe will ultimately prevail in this country."

The English cases cited can hardly be said to go so far. But suppose it be granted that each party may stand on the facts of the case, what meaning shall we attach to the phrase, and what consequences must follow? More can hardly be intended than that in the absence of fraudulent conduct or intent on his part, the surety who signs after a forged name shall be deemed to have been no more and no less careless than the obligee who accepts the paper with the forged name thereon, and neither shall be deemed to have owed any duty to the other to detect and expose the false signature. In other words, they stand, on the facts of the case, alike deceived and alike blameless or in fault. What are the consequences as to their rights under the contract? Shall the surety be discharged, and the obligee get nothing? It will not do to say that the consideration on which the surety signed has failed in any part. The consideration as to him, as well as the principal debtor, moved

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from the creditor, and is in no degree diminished. But if we confound consideration with motive or inducement, it still may not be said to have wholly failed, because in the language of Judge REDFIELD, in note to *Seely v. People*, 2 Am. L. Reg. (N. S.) 346, "he is supposed to have assumed the obligation, in part at least, upon the credit of the party for whom he became surety," and cannot have relied on his supposed co-obligor for more than a contributive share of the liability.

The plain solution of the question, in accordance with legal principles and natural justice, is that the parties will be left in the predicament into which they have voluntarily come, and neither being able to claim that he was misled or deceived by the other, their contract will be enforced as they made it. There is no equity in the case which can interrupt the course of the law.

[Omitting minor questions.]

We find no error in the record. The judgment of the Circuit Court is therefore affirmed, with costs.

Judgment affirmed.

RUDDELL V. DILLMAN.

(73 Ind. 518.)

Negotiable instrument — fraud in procuring — negligence of maker.

Where one signs a negotiable note relying on the fraudulent representations of the payee that it is something different from a note, and makes no effort to ascertain its tenor, whether he can read or not he is liable thereon to a *bona fide* holder for value.

ACTION on a note. The opinion states the facts.

A. Taylor, for appellants.

M. H. Kidd and *W. G. Hunter*, for appellees.

BICKNELL, C. This was a suit by the indorsees against the maker and indorsers of a promissory note, payable at a bank in this State, to the order of the payee, negotiable by the statute as an inland bill of exchange, and governed by the law merchant. The

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original appellee, John Dillman, was the maker of the note; the other appellees were the indorsers. Dillman answered in two paragraphs.

The first was the general denial. The second was substantially as follows: That Hudson & Dougherty, the payees of the note, came to his residence and proposed to sell him dry goods for fifty cords of wood, and cut the wood themselves, to which Dillman agreed; that the payees then filled blanks in a printed paper and requested him to sign it, telling him it was a contract to deliver fifty cords of wood when called for; that Dillman was old and infirm, blind in one eye and very dim-sighted in the other, unable to see writing or print unless the characters were very large; that he was of weak mind, and wholly uneducated, and could not read writing nor printing unless the printed character were large; that he could not read the paper they presented to him, and that relying on said statement of the payees as to the contents of said paper, and believing said statement to be true, he wrote his name on said paper, where they directed him to write it, believing it to be a contract to deliver fifty cords of wood, and being wholly ignorant that he was signing a note; that the name on the note sued on is his signature, obtained by the said fraudulent representations; that for the foregoing reasons, he could not ascertain the true character of the paper, and was compelled to rely on the said statement and representations of the payees. Wherefore he says that he never executed said note. Each of said paragraphs of answer was duly sworn to by Dillman.

The appellants demurred to said second paragraph, for want of sufficient facts; the demurrer was overruled; a reply was filed in denial of said second paragraph; the issues were tried by a jury and a verdict was returned in favor of Dillman, the maker of the note, and against his co-defendants, the indorsers; the appellants moved for a new trial as against the appellee Dillman.

The first three reasons for a new trial allege improper admissions of testimony on behalf of Dillman. The fourth reason alleges error of the court in permitting the jury to amend the form of their verdict. The fifth and sixth reasons allege, respectively, that the verdict was not sustained by sufficient evidence, and is contrary to law. The errors assigned here are: First. That the court erred in overruling the demurrer to the second paragraph of Dillman's answer. Second. That the court erred in overruling the motion for a new trial.

After the assignment of errors, the appellee, John Dillman, died, and Abraham Dillman, his administrator, was substituted as appellee in his stead.

The case of *Maxwell v. Morehart*, 66 Ind. 301, is decisive of this case. There the action was by indorsers against the maker of commercial paper; the answer was the general denial and a second paragraph; a demurrer to the second paragraph was overruled; a reply was filed in denial; the issues were tried by a jury; the verdict, as in this case, was in favor of the maker of the note, and on the appeal, the same errors were assigned as in this case. Morehart's answer alleged that the payee of the note came to his house and proposed to appoint him an agent to sell patented churns; that he accepted the agency; that nothing was said about a promissory note; that if there was any note in the paper signed by him, he did not know it, and could not, by reasonable diligence, have discovered it; that he was a farmer, not accustomed to trade in patents; that his eye-sight was defective; that he could not read without spectacles, and had no spectacles, and merely signed his name at the place pointed out by the payee; that if his signature was on said note, it was obtained by fraud, which he could not have prevented by the use of due diligence.

This court held that the demurrer to the foregoing paragraph ought to have been sustained, and Howk, J., delivering the opinion of the court, said that the appellee was a witness for himself at the trial, and testified substantially to the same facts stated in the second paragraph of his answer. If those facts were a sufficient defense, it might be said there was evidence in the record tending to sustain the verdict, and we could not disturb it; so that the only question for our decision is, are such facts a valid defense to the action. All this is true of the present case.

The court further said that it cannot be questioned that the appellee, upon the facts stated in the second paragraph of his answer, was guilty of negligence in failing to use reasonable care to inform himself of the character and contents of the instrument he executed, and in such a case, having executed a note negotiable as an inland bill of exchange, he must be held liable to the indorsees thereof, before maturity, in good faith, without notice and for a valuable consideration. To the same effect are the following recent decisions. *Indiana National Bank v. Weckerly*, 67 Ind. 345; *Kimble v. Christie*, 55 id. 140; *Fisher v. Von Behren*, 70 id. 19; s. c., 36 Am. Rep.

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162; *Nebeker v. Cutsinger*, 48 Ind. 436; *Ruddell v. Fhalor*, 72 id. 533; s. c., 37 Am. Rep. 177. The rule established in these cases is, that when a man, whether he can read or not, signs a note, negotiable according to the law merchant, relying on the false and fraudulent representations of the payee that it is something different from a note, and making no reasonable effort to ascertain the tenor of it, he is liable thereupon to a *bona fide* holder, for a valuable consideration, who took the note before maturity, and without notice of the fraud.

The court below erred in overruling the appellants' demurrer to the second paragraph of John Dillman's answer, and in overruling the motion for a new trial. The appellant concedes that the judgment as to the indorsers was right. The judgment of the court below in favor of the appellee Dillman ought to be reversed, and a new trial ordered as to his administrator.

PER CURIAM. It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be, and the same is hereby, in all things reversed, as to the said appellee Abraham Dillman, administrator, at his costs, and this cause is remanded for a new trial as to the said Abraham Dillman, administrator.

Reversed and remanded.

PARKER V. PITTS.

(73 Ind. 597.)

Sunday — note executed on — ratification.

The execution of a note by an accommodation surety on Sunday is void, although the note is dated on a week day, and is delivered by the principal to an innocent payee on a week day; and a request by the surety to forbear suit, and his notifying the payee of property of the principal to which he might resort, do not amount to a ratification. (*See note, p. 157.*)

ACTION on a promissory note. The opinion states the case. The plaintiff had judgment below.

E. M. Spencer, for appellant.

W. P. Edson, for appellee.

NIBLACK, C. J. This action was commenced before a justice of the peace, by Joseph Pitts, against Samuel Stallings and James M.

Parker, upon a promissory note for one hundred and fifty dollars. Stallings made default. Parker defended upon the ground that he executed the note on Sunday, and at the trial the justice found in favor of the plaintiff, and rendered judgment against both of the defendants. Parker alone appealed to the Circuit Court, where, upon a trial by the court, there was a finding and judgment against him for a balance found to be due upon the note. Parker has still further appealed to this court and insists that the finding of the court below was not only not sustained by sufficient evidence, but was against both the law and the evidence.

It appeared, from the evidence, that on the Sunday previous to the delivery of the note to the plaintiff, Stallings, the co-defendant before the justice, being the principal in the note and too unwell to go himself, sent his wife with the note, which was dated upon another and a business day, to Parker's house, for the purpose of getting Parker to sign the note as surety for him, said Stallings; that Parker, who was unable either to read or write, thereupon, on that Sunday, signed the note as such surety, in the presence of Mrs. Stallings, by making his mark thereon, and as thus signed gave it back to Mrs. Stallings, without any directions as to its delivery, or in any other respects; that Mrs. Stallings then returned home with the note and on the same day gave it to her husband; that Parker had no conversation with any one else about the execution of the note and gave no one else any direction concerning its delivery; that after the note became due the plaintiff came to see Parker about the payment of it, and Parker then told the plaintiff that Stallings had some hogs which he might sell and apply on the note; that the plaintiff afterward saw Stallings, and he sold hogs and paid a portion of the note; that afterward the plaintiff met Parker in the road, when Parker inquired how he and Stallings were getting along with the note; that the plaintiff replied that he could not wait much longer; that Parker then said, "Don't sue until I can see Stallings;" that the plaintiff did not know that Parker had signed the note on Sunday until after suit had been brought upon it.

We have no brief from the appellee, and hence no suggestion from him as to any ground upon which the judgment in this case might be sustained.

This court has several times held that the execution of promissory notes, and other written obligations, on Sunday, under circumstances

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similar to those disclosed in the evidence in this case, was void, and in obedience to the evident weight of authority, we feel constrained to adhere to the rule thus recognized as applicable to such contracts in this State. *Davis v. Barger*, 57 Ind. 54; *Gilbert v. Vachon*, 69 id. 372.

As none of the consideration was received by Parker, we cannot say that what occurred between him and the plaintiff, after the note became due, tended in any manner to show a ratification by Parker of the execution of the note. *Banks v. Warts*, 13 Ind. 203; *Callett v. Trustees*, 62 id. 365; *Kountz v. Price*, 40 Miss. 341; *Myers v. Meinrath*, 101 Mass. 366; s. c., 3 Am. Rep. 368; *Ryno v. Darby*, 5 C. E. Green, 231; *Finn v. Donahue*, 35 Conn. 216; *Pate v. Wright*, 30 Ind. 476; *Bradley v. Rea*, 103 Mass. 188; s. c., 4 Am. Rep. 524; *Day v. McAllister*, 15 Gray, 433; *Pope v. Linn*, 50 Me. 83; *Ladd v. Rogers*, 11 Allen, 209; *Hazard v. Day*, 14 id. 487; *Reeves v. Butcher*, 2 Vroom, 224. Also, see *Perkins v. Jones*, 26 Ind. 499; *Reynolds v. Stevenson*, 4 id. 619; *Link v. Clemmens*, 7 Blackf. 479.

The judgment is reversed, with costs, and the cause remanded for a new trial.

Judgment reversed, cause remanded.

Petition for a rehearing overruled.

NOTE BY THE REPORTER. — In *Hellams v. Abercrombie*, 15 S. C., it was held that at common law or under a statute forbidding tradesmen, workmen, laborers, etc., to exercise any worldly labor, business or work in their ordinary calling upon the Lord's day, under a certain penalty, a mortgage executed on Sunday is not illegal. The court said: "Is a contract of this character illegal either by the common law or statute law, because made on Sunday? Whatever may be our opinion as to the moral or religious aspects of this question, yet this case cannot be decided upon considerations of that character. The question is strictly a legal question, and must be determined upon legal principles. *State v. Ricketts*, 74 N. C. 187. The argument of the respondent's attorney has gone very fully and learnedly into this question. The case of *Swann v. Broome*, 3 Burr. 1595, referred to by him, seems to be the leading case on the subject. Parties who may be curious as to the powers of the courts on a Sunday will find the law in the cases of *Shaw v. McCombs*, 3 Bay. 223, and *Hüller v. English*, 4 Strob. 488. In *Shaw v. McCombs*, this expression is used: 'Sunday is not a day in law, — *dies dominicus et non dies juridicus*, — consequently all temporal business transaction on that day is null and void.' But this was only an inference of the reporter not sustained by the facts. Under these cases it appears that there is nothing in the common law which renders this contract void. 2 Pars. on Cont. 757.

"Is the contract void by virtue of any statute of the State? The act of 1712 is the only act on the subject. That act forbids tradesmen, workmen, laborers, etc., from exercising any worldly labor, business, or work in their ordinary calling upon the Lord's day under a certain penalty. The execution of the mortgage now under consideration does not fall within the penalty of this act, and therefore void. It was not an act done within the ordinary calling of the parties. It was a casual and exceptional act, and in no way violated the act of 1712.

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"The first section of 29 Car. 2 was very similar in its terms to the act of 1712. This section was construed in the cases of *Drury v. Defontaine*, 1 Taunt. 181, and in *Bloxome v. Williams*, 3 B. & C. 232, not to embrace contracts made outside of the ordinary calling of the party. True, in one case decided a different doctrine was held, the construction above being regarded as too narrow, and contrary to the spirit of the act; but in the subsequent decisions, especially in the case of *Rez v. Inhab. of Whitnash*, 7 B. & C. 584, the decision in the case of *Bloxome v. Williams*, *supra*, was reaffirmed, and a contract of hiring between a farmer and a laborer for a year, made on a Sunday, was held valid. Such, in our opinion, is the proper construction of the act of 1712, incorporated in the General Statutes, p. 300."

Compare *Kling v. Fleming* (73 Ill. 31), 23 Am. Rep. 131; *Knox v. Chford* (38 Wm. 651), 30 Am. Rep. 28; *Crullson v. Goss* (107 Mass. 430), 9 Am. Rep. 45; *Allen v. Duffe*, *post*; *DeBorth v. Wis. & Minn. R. Co.*, *post*.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

ALLEN v. DUFFIE.

(48 Mich. 1.)

Sunday — subscription on, for building church.

A subscription may lawfully be made on Sunday for the erection of a house of religious worship. (*See note, p. 165.*)

ASSUMPSIT. The opinion states the facts. The plaintiff had judgment below.

O'Brien J. Atkinson and Elliott G. Stevenson, for plaintiff in error.

Wm. T. Mitchell and Wm. Potter, for defendant in error.

COOLEY, J. This is an action brought upon a subscription made for the purchase of a house of worship for a religious society. From the evidence it appears that Levi Morrill, who was one of the trustees of the society, had constructed the building on his own land and at his own expense, expecting, but having no assurance, that the society would take it off his hands and reimburse the cost. At one of the regular services of the society, held on a Sunday in August, 1876, the officiating clergyman stated the facts to the congregation, and a proposition was made that the amount needed to purchase the building from Mr. Morrill be then raised by subscrip-

tion. Many persons then offered sums which they specified. There was a subscription paper with a heading, whereby the several persons promised to pay the sums set opposite their names respectively. This paper was lost or destroyed and was not produced on the trial, and none of the witnesses could say with confidence that it named any payee or any object, but the people well understood the object, and that the purchase was to be for the society then assembled. The several donors did not subscribe their own names, but a Mr. Mills subscribed for them as they announced their proposed gifts. By the terms of the subscriptions as given by the witnesses they would be payable presently, but it seems to have been understood that the subscribers were to have a year to pay in, or longer if they desired, on giving their notes. Among the persons promising to give was the plaintiff in error, who agreed to pay twenty-five dollars. The subscription paper was afterward turned over to Mr. Morrill, and he deeded the church property to the society. When plaintiff in error was afterward called upon for his note, he refused to give it, saying his word was as good as his note, and intimating that as the promise was made on Sunday, he could not be compelled to pay unless he chose to do so. Not having made payment or given his note previous to August, 1876, this suit was then instituted.

[Omitting minor points.]

The principal question in the case is whether the contract was void because made on Sunday. The plaintiff in error contends that the business of raising subscriptions on Sunday to pay off a church debt or to purchase a house of worship is within the prohibition of the statute, and that any contract made in the course of it is therefore void. The defendants in error dispute this, and insist that the case is one within the exceptions of the statute. The statute is as follows: "No person shall keep open his shop, warehouse or workhouse, or shall do any manner of labor, business or work, except only works of necessity and charity, or be present at any dancing, or at any public diversion, show or entertainment, or take part in any sport, game or play, on the first day of the week; and every person so offending shall be punished by a fine not exceeding ten dollars for each offense." Comp. L., § 1984. Whatever labor, business or work is prohibited by this statute is confessedly illegal, and promises made in the course of it can support no action. So much is conceded.

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Is the raising of money for the purchase of a house of worship a work of necessity or charity? That is the question made; or perhaps it is a little narrower than this, namely: Is the solicitation of contributions from a congregation assembled on Sunday for religious worship, in order to pay for a house of worship which has been erected for their occupation for religious purposes, a work of necessity or charity? The Circuit judge was of opinion that the question involved an element of fact as well as of law, and he submitted it to the jury in that view. "If the agreement or contract," he instructed them, "was made on Sunday, it is void unless it is a work of necessity or charity for which it was made. Our statute prohibits the performance of business or labor on Sunday except as to work of necessity or charity, and the Supreme Court has decided that all contracts made on that day are void except for a work of necessity or charity. As to whether this subscription comes within this exception I shall leave it for you to determine. There may be honest differences of opinion on this subject, and therefore I leave it to you as a question of fact. And you are not to be controlled in considering this by the practice of churches. It is not what churches have done in this respect, but what they ought to have done in view of the statute. This law may be intended to prevent this business in churches. The raising of money to build churches may have been one of the objects contemplated by the statute. If you find that this subscription was not for a work of necessity or charity, it is void and cannot be ratified. If you find it to be a work of necessity or charity, it need not be ratified."

The judge was in error in supposing that the question was either wholly or partially a question of fact. It is a question of law, purely, and cannot be left to depend upon the opinions of jurors as to what is a work of charity or necessity and what is not. If it could, there would be and could be no settled rule whatever, for jurors will never agree upon it. The question is purely one of statutory construction, and when we find what the statute intends, that intent must be the law for all cases. Nevertheless if the rule of law is found to be in accord with the finding of the jury, namely, that the promise in question is within the exception of the statute, the instruction will thus appear to have been harmless, and the verdict may be allowed to stand.

We shall waste no time upon the question whether the business done in taking the subscriptions was a work of necessity. No

doubt the time chosen was the most convenient time for taking up subscriptions, because the persons concerned would be likely to be generally present, but it might for the same reason have been the most convenient time for doing other business, such as the trading of horses, the hiring of laborers, and the general settlement of accounts, had the persons present been disposed to engage in such transaction. If mere convenience is to be the test of necessity, any work on Sunday may be shown to be necessary under some circumstances. *Jones v. Andover*, 10 Allen, 18; *Sparhawk v. Union Passenger Railway Co.*, 54 Penn. St. 401; *Johnston v. Commonwealth*, 22 id. 102. The defendants in error do not pretend to sustain such a doctrine, but rely upon the exception in favor of works of charity.

What then are works of charity? What works are exempted from the prohibition of the statute as fit and proper to be done upon a day which is generally observed as a day of rest and of worship? This is the inquiry to which our attention is limited.

Charity is active goodness. It is doing good to our fellow men. It is fostering those institutions that are established to relieve pain, to prevent suffering, and to do good to mankind in general or to any class or portion of mankind. As the term "charity" is made use of in our law, it no doubt takes on shades of meaning from the Christian religion, which has largely affected the great body of our laws, and to which we must trace the laws which punish what the Christian regards as the desecration of the first day of the week. It was never doubted, so far as we know, that all the necessary or usual work connected with religious worship was work of charity. If it were not so, the minister who preaches, the organist and precentor who furnish the music, and the sexton who cares for the building on Sunday, would be violating the law every day they performed service for their religious society, and not only would be precluded from recovering compensation, but might be punished for services which are proper in themselves, and for which the day is specially set apart. But their work is not illegal, because it is in a true sense, and indeed in the very highest sense, charitable. Religious societies are formed to do good to mankind.

The Statute of Charitable Uses, 43 Eliz., ch. 4, enumerates the repair of churches among the charitable objects which it specifies. It would be unsafe to take that statute as the test of what might be done on Sunday, for it enumerates many objects which are only

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charitable in the sense that private provision for them tends to relieve the general public of a burden. A school-house or a town hall may be the subject of a charitable use, under the statute of Elizabeth, because when provided for by a private donor, the community which must otherwise have borne the burden is relieved and benefited. But as the public is not taxed for the support of churches and other religious societies, a private donation in their aid is not charity in the same sense in which a donation which relieves a public burden is a charity. The charity in such case consists in giving aid to an institution whose purpose is to do good in other ways than by making pecuniary burdens lighter, and this, as is said above, is charity in a higher sense than is the mere relief from a pecuniary burden.

It has been said that "to save life, or prevent or relieve suffering, and this in the case of animals as well as men; to prepare needful food for man and beast; to save property, as in case of fire, flood, or tempest, or other unusual peril, would unquestionably be acts which fall within the exception" of the statute. *Commonwealth v. Sampson*, 97 Mass. 407, 409. By another authority it is asserted of the Sabbath as its observance is protected in Pennsylvania, "that rest, and the public worship of Almighty God, were the primary objects of the institution, both as a divine and civil appointment; and it seems to me to follow, as a necessary consequence, that no means reasonably necessary to these ends can be regarded as prohibited." *Johnston v. Commonwealth*, 22 Penn. St. 102, 111. In a series of decisions in Massachusetts the exception of the statute is held to cover every thing which is morally fit and proper to be done upon Sunday, under the particular circumstances of the case. *Commonwealth v. Knox*, 6 Mass. 76; *Flagg v. Millbury*, 4 Cush. 243; *Bennett v. Brooks*, 9 Allen 118; *Doyle v. Lynn, etc., R. R. Co.*, 118 Mass. 195; s. c., 19 Am. Rep. 431. In other States a similar doctrine is held, and its origin is traced to the very founder of the Christian religion. Where Sunday travel is prohibited, it is nevertheless lawful to go reasonable distances to visit near relatives (*McClary v. Lowell*, 44 Vt. 116; s. c., 8 Am. Rep. 366; *Pearce v. Atwood*, 13 Mass. 324; *Gorman v. Lowell*, 117 id. 65), or even intimate friends. *Commonwealth v. Sampson*, 97 Mass. 407. On the general subject the following cases throw more or less light, and are all in the same direction: *Logan v. Mathews*, 6 Penn. St. 417; *Johnston v. People*, 31 Ill. 469; *Stanton v. Metropolitan Railroad*

Co., 14 Allen, 485; *Feital v. Middlesex Railroad Co.*, 109 Mass. 398; S. C., 12 Am. Rep. 720.

The support of religious societies being in itself a charity, the general custom of such societies as to the methods by which the means of support may be collected may throw much light on the question, what is admissible? The general sense of a Christian people has demanded and secured the law, and their method of observing the day must be some evidence of the sense in which the law is enacted. Now it is matter of common observation that religious societies solicit moneys for their needs and take subscriptions at their regular meetings on the first day of the week. The custom is from time immemorial. The regular sabbath offerings, as they are called, are limited sometimes to gifts for the poor, or for sacramental purposes, or missions, but quite as often they embrace gifts for the general needs of the society, including the repairs of the church, the lighting and heating, the payment of the taxes, and the numerous other needs which do not differ at all from the needs of ordinary business associations. Nobody has ever asserted, so far as we are aware, that the taking up of these Sabbath offerings was illegal and punishable under the statute. On the contrary the custom is considered fitting and proper to the occasion, and the congregation gives no doubt with a devotional spirit that is fully in harmony with the purpose for which they are assembled.

And if small sums may be gathered on Sunday for the support of public worship and for providing buildings for the purpose, and keeping them in repair, why not large sums? Does the amount of the several gifts make any difference when the general object is the same? Is it legal for deacons, vestrymen or other officers to pass a box for the reception of contributions in small change, and illegal for the officiating minister, as he stands in his pulpit, to solicit contributions in dollars?

In whatever consideration we give to this subject we are to keep in mind that the promise, if void at all, is void because the transaction in the course of which it is made is prohibited and made punishable by statute. If it is, then all business similar in its nature connected with church work and pertaining to what may be called the secular side of religious organizations, must be illegal and punishable also. The clerk of the society could not make his annual report on Sunday; the treasurer could not report the accounts between the society and its several members; the clergyman

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might be fined for appealing to his parishioners to be more liberal in their donations, and a warden or moderator might be fined for taking on Sunday a vote of the congregation that the salary of the officiating clergyman should be increased. None of these acts pertain to the religious worship, but they are nevertheless means by which religious worship is supported. And the taking up of subscriptions is only one method by which the cost of sustaining churches is apportioned among those who feel disposed to aid in so doing.

There may be and no doubt are differences of opinion as to whether it is wise or even decorous to pursue in aid of church building the course that was taken in this case. With those differences we have nothing to do. The questions which arise upon them are addressed to the congregations themselves, and must be settled by them. We have no doubt whatever that the support of public worship is a work of charity within the meaning of the statute, and that promises like the one now in question may be sustained on that ground.

We have not overlooked the fact that in *Callett v. Trustees, etc.*, 62 Ind. 365; s. c., 30 Am. Rep. 197, it was assumed by the Supreme Court of Indiana that such a promise was illegal. The report of the case does not show that the illegality was contested, and the case seems to have turned on a question of ratification. A point thus assumed without consideration is of course not decided.

We are of opinion that the judgment should be affirmed with costs.

Judgment affirmed.

The other justices concurred.

NOTE BY THE REPORTER.—The same doctrine was held in *Dale v. Knapp*, Supreme Court of Pennsylvania, October, 1881. The court said: "A contract made on Sunday is not void at common law. *Kepner v. Keefer*, 6 Watts, 231; *Fox v. Menoch*, 3 W. & S. 446; *Shuman v. Shuman*, 3 Casey, 90. If then this contract is void, it is by reason of the act of April 22, 1794. That act declares: 'If any person shall do or perform any worldly employment or business whatsoever on the Lord's day, commonly called Sunday, works of necessity and charity only excepted,' and such other exceptions as are mentioned in the proviso, every person so offending shall be subject to the penalty as in the act prescribed.

"It may be conceded that the making of this subscription is not a work necessarily done on Sunday. The question then is, whether the raising of money to build a house of worship is a work of charity, within the meaning of the act, or is the solicitation of contributions for that purpose from a congregation assembled on Sunday for religious worship, a work of charity?

"No man can legally be compelled to contribute toward the erection of a house for public worship, nor to attend or support religious services therein. The statute imposes no such obligation. It however does recognize Sunday as the proper day for public worship,

It leaves every one free to use the day for that purpose or refrain from such use. It is designed to compel a cessation of all those employments which will interfere with or interrupt the exercise of religious services, either public or private, on that day. The right to so worship is protected by its penal enactments. Each person has an indefeasible right to worship Almighty God according to the dictates of his own conscience. Each is at liberty to use Sunday for the purpose contemplated by the statute. If he refrains therefrom, he shall not so use the day as to annoy others who may be engaged in religious worship. *Johnson v. Commonwealth*, 10 Harris, 102. The purpose of the law is to protect the day for the comfort of those conducting or attending religious worship. Charity is active goodness. The means which long established and common usage of religious congregations show to be reasonably necessary to advance the cause of religion are not forbidden, and may be deemed works of charity, within the meaning of the statute. It is not essential that they be purely charitable. It is sufficient if they so far partake of that character as to be recognized by the congregation as a part of its active goodness, and are not expressly forbidden by the statute. *Commonwealth v. Nesbit*, 10 Casey, 398.

"The inclination of this court has long been not to permit a person to set up this law against another person from whom he has received a meritorious consideration or on whom he has inflicted an injury. It was therefore said, in *Mohney v. Cook*, 2 Casey, 342, that the law relating to the observance of the Sabbath defines a duty of the citizen to the State, and to the State only. It was there held that one who had erected an obstruction in a navigable stream, whereby the boat and cargo of another were wrecked on Sunday, could not, in an action for such injury, set up as a defense that the plaintiff was unlawfully engaged in navigating his boat on that day. So it was held the hiring of a carriage on Sunday by a son to visit his father created a legal contract, although no reason was shown for visiting him on that day, other than flows from a general filial duty and affection. *Long v. Matthews*, 6 Barr. 417. It is not a violation of the act for a hired domestic servant to drive his employer's family to church on Sunday in the employer's private carriage. *Commonwealth v. Nesbit*, *supra*. A will executed on Sunday is not void, although at the time the testator be in his usual state of good health, and live five or six months thereafter. *Beitenman's Appeal*, 5 P. F. S. 168.

"Contracts for services on Sunday of the preacher, the sexton, the organist and the singers are not illegal, although these persons may engage in such employment as a means of livelihood. Their services are in furtherance of the same great charity.

"The customs of soliciting contributions on Sunday from congregations assembled for religious worship is very general, and has existed from an early period of time. With some denominations it may be for a greater variety of objects than with others. Sabbath offerings may be for the incidental expenses of the church; to light and warm the house, to pay the organist and the sexton, to assist the poor, to repair, enlarge and rebuild the church edifice, to support foreign and domestic missions. The latter often extends to furnishing aid to poorer congregations toward erecting houses of worship. If it be illegal to give or agree to give for such objects on Sunday, it must be illegal to solicit the giving. We are not aware it has ever been held that the preacher became liable to the penal provisions of the statute by soliciting from the pulpit such contributions, nor any of the officers of the church for taking up the collection. Whether the sum be large or small does not change the principle applicable to the transaction. It is true there is a legal distinction between having given and agreeing to give; yet inasmuch as we think a subscription toward the erection of a house of public worship is a work of charity, such agreement is not prohibited by the act of 22d of April, 1794. The conclusion at which we have arrived is not in accord with the doctrine assumed in *Collett v. Trustees*, 63 Ind. 365; a. c., 30 Am. Rep. 197; but in principle it is in harmony with the rule declared in *Flagg v. Milbury*, 4 Cush. 243; *Bennett v. Brooks*, 9 Allen, 118; *Doyle v. Lynn*, 118 Mass. 195; a. c., 19 Am. Rep. 431; and directly sustained in *Allen v. Duffie*, 43 Mich. 1.

"The support of religious societies is a charity. It is a giving for the love of God, or the love of a neighbor in a broad Catholic sense. Whatever is morally fit and proper to be done on Sunday in furtherance of the great object, is likewise a charity. The learned judge therefore erred in ordering a nonsuit and in refusing to take it off."

In *O'Rourke v. O'Rourke*, 43 Mich. 58, it was held that a note made on Sunday is not void at common law, and in a suit on a foreign note any foreign statute invalidating it must be

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proved. The court said: "Whether the note was caused to be invalid on account of being made on Sunday depended on the statutes of New York. It was not void by the common law. *Mackalley's case*, 9 Co. 66b; Cro. Jac. 280; *Watts v. Hundred of Stoke*, Cro. Jac. 486; *The King v. Brotherton*, 1 Stra. 708; *Swann v. Broome*, 3 Burr. 1595, 1597; *Drury v. De Fontaine*, 1 Taunt. 131; *The King v. Whitnash*, 7 B. & C. 598; *Begbie v. Leet*, 1 Tyrw. 130; 1 Cr. & J. 180; *Story v. Elliot*, 8 Cow. 87; *Bataford v. Every*, 44 Barb. 618; *Geer v. Putnam*, 10 Mass. 512; *Johnson v. Day*, 17 Pick. 106; *Kepner v. Keefer*, 6 Watts, 281; *Fox v. Mensch*, 3 W. & S. 444; *Adams v. Gay*, 19 Vt. 363; *Bloom v. Richards*, 2 Ohio St. 387; *Davis v. Barber*, 57 Ind. 54; *Tucker v. West*, 29 Ark. 386. If any laws existed in New York to impair the contract they should have been proved. *Kernott v. Ayer*, 11 Mich. 161; *Ellis v. Maxson*, 19 Mich. 186; *Wheeler v. Constantine*, 39 Mich. 68; s. c., 38 Am. Rep. 355. We cannot assume that other States have legislated as we have in regard to the observance of Sunday or the first day of the week, and the record is silent relative to the course or state of legislation in New York. If we were disposed to speculate on the subject, we should not infer that the note would be void there. *Smith v. Wilcox*, 24 N. Y. 353; *Merritt v. Earle*, 29 id. 115; *Eberle v. Mehrbach*, 55 id. 692. The whole contention therefore arising out of the circumstance that the note was made in New York on Sunday had no legal foundation and was immaterial, and the various rulings respecting it afford the plaintiff in error no ground of complaint. If any was prejudiced it was the defendant in error." See *Parker v. Pitts*, ante.

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(43 Mich. 150.)

Ship and shipping — authority of ship's husband.

A ship's husband, being also part owner, cannot by mere virtue of such relation bind the co-owners by obtaining bail for the release of the vessel from seizure under civil process for collision and for repair.

ASSUMPSIT. The opinion states the case. The defendant had judgment below.

Holmes, Collins & Stoddard, for plaintiff in error.

Hatch & Cooley, for defendants Chambers.

GRAVES, J. [Omitting statement and minor points.] But there is a further consideration which is not free from difficulty. There arises the general question whether the facts found by the Circuit judge make out a cause of action in Mitchell's favor against Chambers as for money paid by him to their use. And this general question is divisible into two or more precise characters: First, whether upon the finding, it appears that Lester and Fuller, or either of them, had authority to stipulate in such manner for the

release of the vessel as to create a personal though contingent liability on the part of Chambers for an amount up to its value; and second, whether it appears from the finding that the stipulation was given to operate in the interest of the defendants Chambers, and was so made as to have the effect to bind them personally, and oblige them to make up to the plaintiff as surety whatever he should be compelled to pay.

First. As to the question of authority, and in respect to which the case made by the finding must be adhered to.

Fuller and Lester were severally part-owners. At the same time the latter was managing owner, or ship's husband, and the former was master. The vessel was at Bay City, found to have been her home port; and the home port, under the laws of the United States, is that at, or nearest to which, the owner, if there be but one, or if more than one, the husband or acting or managing owner usually resides. U. S. R. S. (2d ed.), § 4141; *White's Bank v. Smith*, 7 Wall. 646; *Morgan v. Parham*, 16 id. 471. The defendants Chambers were residents of Flint, in the county of Genesee, which was near by. The several part-owners were not partners in respect to the vessel. Their relation was that of co-tenants. That is the ordinary relation, and they will not be regarded as partners unless the fact is distinctly shown (3 Kent Com. 155; *Wetherell v. Spencer*, 3 Mich. 128; *Macy v. De Wolf*, 3 W. & M. 193), and there is no such finding. The case can therefore derive no aid from the rule of agency applicable to those who own as partners. And in the present state of the law it cannot be maintained on the facts found by the Circuit judge, that as mere part-owners Lester and Fuller were competent to find bail for the ship on the behalf and responsibility of the defendants Chambers, and it is very clear that in his character of master, Fuller had no such power. Story on Part., §§ 421, 422, 453; *Brodie v. Howard*, 17 C. B. 109; 33 E. L. & E. 146; *Mitcheson v. Oliver*, 5 El. & Bl. 419; 32 E. L. & E. 219; *Revens v. Lewis*, 2 Paine C. C. 202; *Hardy v. Sproule*, 31 Me. 71.

This conclusion is not supposed to be contested, and it brings the inquiry under the first head to the point whether Lester's position as ship's husband clothed him with power. And this is a question of agency, and not one concerning the existence, character and force of a pure element of part-ownership.

"The ship's husband," says Chancellor Kent, "may either be one of the part-owners or a stranger, and he is sometimes merely an

agent for conducting the necessary measures on the return of the ship to port; but he may have a more general agency for conducting the affairs of the vessel in place of the owners, and his contracts, in the proper line of a ship husband's duty, will bind the joint owners. His duty is generally to see to the proper outfit of the vessel, as to equipment, provisions and crew, and the regular documentary papers; and though he has the powers incidental and necessary to the trust, it is held, that he has no authority to insure or borrow money for the owners, or bind them to the expenses of lawsuits." 3 Kent Com. 157. He cites *French v. Backhouse*, 5 Burr. 2727; *Sims v. Brittain*, 4 B. & Ad. 375; *Bell v. Humphries*, 2 Stark. 345; *Campbell v. Stein*, 6 Dow. 116; 1 Bell Com. 504; Bell Principles of the Law of Scotland, §. 449; Collier on Part., bk. 5, ch. 3, § 4; Story on Agency, § 35. To these citations may be added, Story on Part., § 446; 1 Pars. Marit. Law, 97; Abb. on Shipping, 107, 137; 2 Duer on Ins. 200; 2 Pars. on Cont. 268; Evan's Agency by Ewell, 219, 220; *Holcroft v. Wilkes*, 16 Ind. 373; *McCready v. Woodhull*, 34 Barb. 80; *Hewett v. Buck*, 17 Me. 147; *Patterson v. Chalmers*, 7 B. Mon. 595; *Hoogland v. Wight*, 7 Bosw. 394; *Foster v. United States Ins. Co.*, 11 Pick. 85; *Turner v Burrows*, 8 Wend. 144.

In describing the authority generally possessed by the ship's husband, Judge STORY says he "is understood to be the general agent of the owners, in regard to all the affairs of the ship in the home port," and as such "is intrusted with authority to direct all proper repairs and equipments and outfits for the ship; to hire the officers and crew; to enter into contracts for the freight or charter of the ship, if that is her usual employment; and to do all other acts necessary and proper, to [prepare and] dispatch her for and on her intended voyage. But his authority does not extend to the procuring of any policy of insurance on the ship, either in port or for the voyage, without some express or implied assent of the owner." Story Agency, § 35. The same learned writer, in his work on Partnership, discusses the implied authority of one part-owner to bind another, and observes that "one part-owner may bind the others by his contract for repairs and materials and expenses of outfits by implication, when there is no known disagreement among them, and there is an acquiescence in what is done, or is doing. But there are certain other authorities, which do not arise by implication of law under ordinary circumstances; and therefore such au-

thorities, whether exercised by a ship's husband, or by a mere part-owner, will not bind the other owners, unless there is either direct proof, or a strong presumption, that they have been positively conferred upon them. Thus, for example, neither the ship's husband, nor any part-owner, as such, has a right to insure the ship, or to borrow money, on account of the owners, or of other part-owners; or to pledge their shares in the ship for the expenses of a lawsuit." § 446.

Parsons observes that the managing owner or ship's husband is the general agent of all the owners in respect to the ship; but that it is not customary to define his powers and duties by any written or oral bargain, because they are supposed to be sufficiently determined by usage. In referring to the limits of the authority, he says the managing owner cannot borrow money and bind the owners for it, nor give up the lien for freight earned, nor insure the ship for the owners, nor purchase a cargo for them without their special authority. 2 Pars. on Cont. 268.

There is no finding of any express agreement in regard to Lester's powers as ship's husband, nor any finding of usage concerning the nature and extent of such agency, nor any finding that the proceedings to release the vessel were accepted or acquiesced in by defendants Chambers as proceedings on their own account. Neither is there any ascertained final inference of fact on the subject. The whole question is left as one of legal implication from the group of findings reported by the learned judge.

It recurs to inquire whether they are competent to imply the power claimed. Lester held, in respect to the defendants Chambers, just such authority as their silent indifference and acquiescence admitted, and no more; and it will be conceded that their assent, as drawn from their saying nothing and doing nothing, can be made to cover only such incidents and occasions as the ship's husband is usually allowed to deal with, and to justify only such steps on his part as are fairly appropriate to the incident or occasion arising.

It is said in the finding, that the propellor "was lying at Bay City with a tow of vessels, on the point of leaving and ready to leave said port to carry lumber loaded on her, and to tow said vessels to the port of Sandusky, in Lake Erie," at the time of seizure, and "that it was desirable and for the benefit of the owners that said vessel should be permitted to proceed to her destination." She

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was therefore under seizure on civil process out of the admiralty, at her home port, and in a state of security; and it is not found that either of the demands for which she was detained was a personal charge against the defendants Chambers, or included in those designed to be provided for by the agreement with Murdock, and the fact cannot be presumed by the court. Granting, for the purpose of this review, that the claims were liens on the vessel, no facts are found to show that they were incurred in any such manner as to work out a personal charge against Chambers. On the contrary, the facts disprove such liability in respect to two. They were incurred before those parties acquired any interest. *Mackenzie v. Pooley*, 11 Exch. 638; 34 E. L. & E. 486; *Myers v. Willis*, 17 C. B. 77; 36 E. L. & E. 380; *Macy v. Wheeler*, 30 N. Y. 231; *Weber v. Sampson*, 6 Duer, 358; *Donnell v. Walsh*, 6 Bosw. 621; *Howard v. Odell*, 1 Allen, 85.

And as to the claim of Williams for repairs, there is no finding as to where or at whose request or under what circumstances they were made. Concede that their necessity cannot be questioned now, and still it is not to be assumed that the transaction was under such conditions as to bind the defendants Chambers as personal debtors. Story on Agency, §§ 119, 119a, 120, 121; 3 Kent Com. (Holmes' ed.), §§ 138-173 and notes; *Freeman v. Buckingham*, 18 How. 182; *Belden v. Campbell*, 6 Exch. 886; 6 E. L. & E. 473; *Pentz v. Clarke*, 41 Md. 327; *The Troubadour*, L. R., 1 Ad. & Ec. 302; *The Kalorama*, 10 Wall. 204, 214; *The Woodland*, 7 Ben. 110; *Arthur v. Barton*, 6 M. & W. 138. For the purpose of this case, the situation of the defendants Chambers, relative to the stopping of the vessel and the probable effects of the proceeding, must be looked at under the assumption that they were not personally liable at all for the demands, and that apart from their chance to gain something by sharing in future earnings, their sole interest was that of owners of one-sixth of the vessel.

There is no finding of the vessel's value or of her time, or any finding to explain in any way, in dollars and cents, the necessity there was for her speedy departure, and there is hence no basis for legal belief that the defendants Chambers could gain any thing by the assumption of a personal responsibility to release her. In short, the facts afford no ground for saying that their interest favored any personal risk, in order to permit her "to proceed to her destination."

The exigency did not present one of those ordinary incidents which the ship's husband may of course meet and overcome under his usual power, without recourse to an owner, where that is practicable. And there was no such ground for inferring authority as may exist where an owner leaves the ship's husband to face an emergency without the benefit of an express direction as to the course he is to pursue in such an event, and at the same time either withholds or does not afford opportunity to obtain his advice or decision. The case was one which dictated a reference, if practicable, to the defendants Chambers, if it was intended to bind them personally, and according to the finding there was no obstacle in the way of doing so. They were in the neighboring county of Genesee, and where they could be speedily communicated with, and most likely within the space of a few minutes, by resorting to the telegraph. *Merritt v. Walsh*, 32 N. Y. 685; *Gager v. Babcock*, 48 id. 154; s. c., 8 Am. Rep. 533; *Beldon v. Campbell*, *supra*; *Woodruff & Beach Iron Works, etc., v. Stetson*, 31 Conn. 51; 2 Bell Com. 199.

Finally, the case made by the finding does not contain "either direct proof or a strong presumption" that the authority was "positively conferred," and it therefore does not establish what, according to the doctrine laid down by Judge STORY, was absolutely requisite to "bind" the defendants Chambers. STORY on Part., § 446.

In the able argument submitted for the plaintiff, the authority chiefly relied on was *Barker v. Highley*, 15 C. B. (N. S.) 27; s. c., L. J. C. P. 270, and it was pressed with much force; and perhaps no other single case can be found having so many points in common with the one before us. The broad proposition was there laid down that "the ship's husband, or managing owner, is an agent appointed by the owners to do what is necessary to enable the ship to prosecute her voyage and earn freight."

Now it is scarcely necessary to say that this statement cannot be taken literally and without regard to the facts which bore upon the controversy and qualified the discussion. The court naturally assumed there would be no failure to understand that what was said was with tacit reference to all the modifying conditions in the case; and felt, consequently, that it would be an idle performance to expressly repeat them.

The statement must be restricted to the question as shaped and

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modified by the state of facts of which all were cognizant, and about which there was no thought of controversy. Unless this is done the observation of the court must be wholly rejected as in plain contradiction of settled law, and moreover as not reasonable at all upon its face. In terms it takes no notice of those variations of power, which depend on variations of circumstances and impute an authority in the agent in all cases to do whatever the owners could do themselves if actually present and consenting. Certainly, the law is not so. The result adjudicated was, that on the facts the co-owner was liable to the surety on the bail bond for the money the latter had been compelled to pay.

But what were the facts? There were two co-owners, and one was managing owner or ship's husband. The vessel ran against another vessel, whereby she became liable to seizure for the tort. But her owners were likewise liable personally. Process was taken in the admiralty against her, and she was accordingly attached. The co-owner, who was not ship's husband, was abroad and beyond reach. The other was hence left by his co-proprietor to act on his individual judgment and with the like power of a partner.

The case was within the rule stated by Chancellor KENT, that "as the law presumes that the common possessors of a valuable chattel will desire whatever is necessary to the preservation and profitable employment of the common property, part-owners, on the spot, have an implied authority from the absent part-owners, to order for the common concern whatever is necessary for the preservation and proper employment of the ship." 3 Kent Com. 155. Accordingly, the managing part-owner, who was "on the spot" or sufficiently near for the purpose, assumed to act for the "absent part-owner" and caused a bond to be given (and as explained in a later case) in the name of himself and his absent co-owner for the release of the ship, and procured Barker to become surety. The ship was thereupon discharged from arrest, and she proceeded on her voyage, earned freight, and was lost whilst under insurance for the benefit of her owners. The absent co-owner, Highley, received his share of the freight and of the insurance money. The suit in admiralty having terminated in favor of the plaintiffs there, the surety was compelled to pay the damages, interest and costs, and he sued Highley for indemnity. The being placed under such formal contract relation to the transaction as to entitle Barker, the surety, to maintain a claim against him personally for repayment,

did not alter Highley's liability in its essential character. His condition was not changed from that of mere holder of an interest subject to a charge for which he was not personally liable, to that of one personally liable, and for the entire charge. The collision authorized a personal remedy against him, and the new obligation did no more. He could not object that it was incumbent on his co-owner to have recourse to him before assuming to connect him with the bonding of the vessel. By his absence he precluded all opportunity to do otherwise than act on a presumption of what he wished, and left his co-owner to proceed on that basis. He could not object that no power was given to shift his concern with the seizure from a non-personal to a personal liability. No such change was made. The liability was personal before as well as after. He could not object that in getting bail his co-owner did not attempt to act for him. The bail was given in his name. He could not object that he had done nothing tending, however remotely, to waive his defense or estop him from asserting his entire want of connection with the transaction. When he received his share of the freight which the liberation of the vessel enabled her to earn, and took his portion of the insurance money which arose as an indemnity for her loss, he accepted benefits connected in some degree with the fact which caused her to be restored, and supplied some evidence tending to show his acquiescence in what had been done in that direction. These facts and considerations distinguish the two cases in the clearest manner, and prove as it seems to me that *Barker v. Highley*, instead of being an authority in favor of the power ascribed to the acting co-owner here, is negatively an authority the other way, if fairly applicable at all to the precise issue to be determined.

In regard to the second question only a few words are called for.

A person who consents to become surety for a party in a legal proceeding must see to it that he acts upon the request of the party himself, or his attorney or agent duly authorized to represent him in that particular. *Gager v. Babcock*, 48 N. Y. 160, 161; s. c., 8 Am. Rep. 532. And when the question of authority concerns the act of a part-owner of a vessel, and the act is one which may be on his individual account, and not on the account of his co-owner, and the transaction does not furnish explanation on its face, it is incumbent on him who alleges that the act was on behalf of both to show, as matter of fact, that it was so. *Broom's Com.* 534, 535.

Now Lester was owner of half of the vessel, not only at the time of the arrest but also for the whole preceding period in which the several claims arose, and had consequently a large and much the largest interest to be protected and fostered. It was quite competent for him to act on his own account when he proceeded to get the vessel liberated. The stipulation or recognizance was made by him as solo principal and by Mitchell as his surety, and the finding is express that the request to the latter to become surety proceeded from Lester and Fuller, and that "Lester signed the said stipulation as principal and as claimant," and that Mitchell "signed and executed as surety." The plain meaning is that Lester was principal and Mitchell his surety.

There is no finding or suggestion that the defendants Chambers were parties to the request made to Mitchell, or that the proceedings were in their behalf, or authorized or desired by them, or that Lester or Fuller assumed to be their agents. Neither is there any finding that Lester assumed to represent or had it in his mind to represent any interest except his own and possibly Fuller's. On the other hand, the stipulation indicates and the finding states that Lester acted "as principal and claimant" and the effect is to raise an inference that he did not act for the defendants Chambers. According to the obvious construction of the finding, Lester, in getting Mitchell to become surety and in doing what was done, did not intend to act and did not assume to act for those parties, and did not intend to get Mitchell and did not assume to get him to be their surety, and there is no finding of any conduct on the part of the Chambers tending in any manner to indicate their accession to the transaction or submission to liability.

The result is that as to the defendants below, Robert Chambers and Garry Chambers, who alone made defense, and on whose account only the case has come up, the judgment must be reversed, and judgment must be entered in this court on the findings in favor of the said Robert Chambers, as survivor of himself and the said Garry Chambers, and for the costs of both courts.

The other justices concurred.

Judgment reversed.

HUBBARD V. MCNAUGHTON.

(83 Mich. 220.)

Assignment for benefit of creditors — condition for release.

An assignment for the benefit of creditors binding the creditors to acceptance and release of their claims in full is void.*

BILL in aid of an execution. The defendant had judgment below. The opinion states the point.

Dallas Bondeman, for complainant.

E. M. Irish, for defendants.

CAMPBELL, J. [Omitting minor points.] But beyond this we think the assignment contains a provision which cannot be sustained. After providing in a proper manner for paying over the proceeds to creditors ratably in certain classes, it ends with this clause: "And the creditors of the said parties of the first part agree to their said assignment, and that they will, as soon as their just proportion of the proceeds of said property shall be paid to them, release their claims in full and discharge said parties from all liabilities to them."

We cannot accede to the correctness of the suggestion that this clause is surplusage and not intended to bind the creditors. The assignment must be taken together, and we think the only reasonable construction it will bear is that every creditor by accepting his dividends releases the debtors.

Such a condition has been maintained in some States. But it seems to us to be entirely repugnant to the whole theory of general assignments. While a debtor at the common law, and until restrained by statute, could pay creditors in such order of preference as he chose, he was nevertheless bound to devote all his unexempted property unreservedly to the payment of his debts. Under this assignment, if all the creditors should decline giving releases, the

* To same effect, *Duggan v. Bites* (4 Colo. 223), 34 Am. Rep. 80. *Contra*, *Clayton v. Johnson*, ante, 40.

whole trust would fail, if this condition were enforced. An insolvent debtor has no right to dictate terms which shall make him independent of his legal obligations. It may be that this is not technically a trust for his own benefit,—which would be in plain violation of law,—but it is practically so, and accomplishes more sweeping results. If the property were not assigned, creditors could by legal process exhaust it and still leave him liable on all debts not fully satisfied. A general assignment can only change the method of applying property in payment, by what ought to be a fairer and less wasteful division. But it is contrary to justice and against public policy to allow debtors to coerce their creditors into releasing their debts.

The New York doctrine, which is set out in the cases collected in Burrill on Assignments, 331, 343, appears to us the sound rule on this subject, and most in harmony with our own decisions on the general subject of assignments. This particular question has not been formally before us. See also, *Spencer v. Slater*, 4 Q. B. Div. 13.

The decree below dismissing the bill must be reversed with costs of both courts and a decree entered holding the assignment void as against complainant's levy.

MARSTON, C. J., and GRAVES, J., concurred.

COOLEY, J. (dissenting). I have not found in the proofs in this case any evidence of the frauds charged in the bill. Neither do I think that the assignment is void on its face. The clause supposed to invalidate it is the following: "And the creditors of said party of the first part agree to their said assignment, and that they will as soon as their just proportion of the proceeds of said property shall be paid to them, release their said claim in full and discharge said parties from all liability to them." This clause is inserted in an assignment not signed or intended to be signed by the creditors, and which contains no provision depriving creditors of dividends under the assignment in case they refuse to assent. On the contrary the assignee is to pay to the several creditors equally in proportion to their several demands, and the creditors may demand and recover their proportions, without entering into any stipulations or submitting to any conditions whatsoever. If any consent to a discharge of the assignors is to be implied as against the creditors, it must

spring from the fact that they accept dividends under the assignment; but when it is made the imperative duty of the assignee to pay these without exacting conditions, and when no trust is reserved in favor of the assignors until all debts are paid in full, there seems to be no foundation whatever for an implied release. Any creditor whom the assignee should refuse to pay ratably would be entitled to call him to account in equity, and it could be no defense that the creditor refused to release, so long as the assignees have required payment to all unconditionally. And surely the receipt of that which the law entitles one to demand as of right cannot be construed into an acceptance of conditions.

WHITE V. HAPEMAN.

(48 Mich. 267.)

Adverse possession — agreement as to boundary — mistake.

By oral agreement between two adjoining owners of land one maintained a division fence entirely within his own bounds for more than twenty years. Subsequently he removed it to the true boundary. *Held*, that ejectment would not lie in favor of the other for the strip of land between the old line of the fence and the true boundary.*

EJECTMENT. The opinion states the case. The defendant had judgment below.

M. Barton, for plaintiff in error.

E. A. Maher, for defendants in error.

COOLEY, J. This action is ejectment for land described in the declaration as a "portion of a strip of land ten rods wide off from the west side of the south-east quarter of the south-west quarter of section 35," in the township of Grattan. Neither the width nor the length of this strip is given, nor any thing else whereby it may be identified and possession given in case the plaintiff should recover. The declaration is therefore fatally defective and no judgment for the plaintiff could be given upon it.

As however the merits of the controversy between the parties have

* See *McArthur v. Luce*, *Evans v. Miller*, *post*.

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been fully examined in this case, and the result of the case going off on a defect of pleadings would probably be a new suit, it may be proper to examine the exceptions. It appears from the case made by the plaintiff that the parties to the suit own adjoining lands; that some twenty-five years before this suit was instituted it was agreed between the parties then owning these lands respectively, and under whom plaintiff and defendants have derived their titles, that the grantor of defendants, for a sufficient consideration, should maintain a division fence between them, but that he should place and keep it entirely within the bounds of his own land. The agreement was oral, and was observed for more than twenty years, when defendants moved the fence upon the line of division between the respective parcels. This suit was thereupon instituted to recover the narrow strip of land between where the fence formerly was and where it has now been placed.

Confessedly this strip of lands belongs to the defendants, unless they have lost it in consequence of the oral arrangement already mentioned, and the long acquiescence of their grantor and themselves in the fence being maintained in accordance therewith. It is not claimed that the oral arrangement could of its own force deprive the owner of his title; it was void in law, and the grantor of defendants might at any time have withdrawn from and refused any longer to be bound by it. There is no pretense that the land has at any time been possessed adversely to the true owner; on the contrary the title of defendants and their grantor has always been recognized, and was conceded in the agreement itself. It is urged in the brief of plaintiff that defendants are now estopped from repudiating an arrangement so long observed, but the grounds of estoppel are not very clearly indicated. One certainly cannot be estopped from asserting a title against a party who has always known of and always recognized it. Moreover, as was shown in *Hayes v. Livingston*, 34 Mich. 384; s. c., 22 Am. Rep. 533, the title to lands cannot pass by estoppel, and if the plaintiff claims, not the title, but the right to permanent possession, this comes to the same result and is equally admissible. *Nims v. Sherman*, 43 Mich. 45.

The plaintiff suggests no other ground of recovery, and it follows that the judgment which was given in the Circuit Court for the defendants must be affirmed with costs.

Judgment affirmed.

The other justices concurred.

HARRIS V. HOPKINS.

(43 Mich. 372.)

Gift — evidence — possession.

An executed gift of furniture from a mother to a son may be inferred from evidence of her declarations of such intent, and the remaining of the son in her house where the furniture was, until her death.

REPLEVIN. The opinion states the point. The plaintiff had judgment below.

James H. Pound, for plaintiff in error.

George A. Cady, for defendant in error.

CAMPBELL, J. Defendant in error sued Mary Harris in replevin before Alexander G. Comstock, a justice of the peace of Wayne county, to recover certain furniture which he claimed as belonging to the estate of decedent, and which Mary Harris claimed as belonging to Myron and Harvey Blaun, by gift from decedent. The justice found there had been a valid gift. The case was taken on *certiorari* to the Wayne Circuit Court, where the justice's judgment was reversed. It now comes up on error from the Circuit Court.

The justice returns that he was satisfied there had been an actual gift and delivery by decedent to Myron and Harvey, who were her sons. The record shows she states positively that she had given the property to them, and there were previous declarations of an intent to give it. It shows also that one of the sons remained at the house till his mother's death. We think there was enough to justify the justice in coming as he did to the conclusion that all the parties understood there was a complete gift without any intention of revocation, and with such possession as was possible. We think further that the evidence would have justified the finding of a complete gift *in præsenti*, if the justice had so found.

Under circumstances such as appeared in this case it was a very natural and reasonable thing for a mother to desire to have her property go directly to her children without the expense of administration, and the case does not indicate that the suit was brought in furtherance of justice.

Millar v. Cuddy.

We think the Circuit Court erred in reversing the judgment of the justice. The judgment of the Circuit Court must be reversed, and that of the justice affirmed, with costs of this court and of the Circuit.

Judgment reversed.

The other justices concurred.

MILLAR V. CUDDY.

(43 Mich. 273.)

Contract — for wages — what employer thinks worth.

An agreement by a master to pay a servant what the master thinks he is worth binds the master to pay what the services are reasonably worth.

ASSUMPSIT. The opinion states the point. The plaintiff had judgment below.

George H. Prentiss, for plaintiffs in error.

James H. Pound, for defendant in error.

MARSTON, C. J. We have been unable to discover any error in this case. The conversation that took place between Brace and one of the plaintiffs was clearly admissible in evidence. It was the commencement and a part of the conversation or negotiations which led to the employment of the defendant in error. It had a tendency to show that a fixed amount was to be paid, and was admissible in any view of the case. On the other hand the defendants below denied that any sum was agreed upon, but that they were to pay him what they thought he was worth to them. This could not mean that they could, after the services had been performed, fix the compensation at such sum as they pleased. Parties may make such an agreement, but we think this language does not warrant any such view. If no agreement as to compensation was made, then the law would imply that they should pay what his services were reasonably worth, and the court so instructed the jury.

[Omitting minor point.]

The judgment must be affirmed, with costs.

Judgment affirmed.

The other justices concurred.

PEOPLE V. ARNOLD.

(43 Mich. 303.)

Criminal law — evidence — testimony of prisoner on former trial.

On a second trial for felony the prosecution may put in as affirmative evidence the testimony of the prisoner on the former trial, with a view of contradicting it, although he does not testify on the second trial.

LARCENY. The opinion states the case.

Attorney-General Otto Kirchner, for the people.

George H. Penniman, for respondent.

COOLEY, J. This case comes up on exceptions to the rulings of the Recorder of Detroit, taken on the second trial of the defendant for the crime of larceny, charged to have been committed October 3, 1878. The firm of A. N. Sabin & Co., produce and commission dealers, were the prosecutors, and the theory of the prosecution was that defendant came to their place of business on pretense of making a purchase of flour, and engaged their attention while a confederate committed the larceny. On the first trial the defendant took the stand in his own behalf, and undertook to account for his presence at Sabin's in the following statement: That he lived in Cleveland, Ohio, and had been engaged there, among other things, in shipping cheese to Chicago; that a few days before the time of the alleged offense, a gentleman from Buffalo, named Foster, had come to see him to get him to buy apples in Michigan; that he had gone to Chicago on business there, making inquiries as to apples on the way; that he came to Detroit October 1, 1878, and on the next day he received a letter from his cousin, who was head book-keeper in the firm of Chandler & Son, on Ontario street, Cleveland, requesting him to make inquiries as to flour in Detroit, and that it was in pursuance of this request that he went to Sabin's and was there at the time of the alleged larceny.

The defendant was convicted on the first trial, but the verdict was set aside, and on the second trial the above statement was put in evidence by the prosecution, with the avowed purpose of following

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it with evidence that defendant's pretense of business at Sabin's was wholly false. The defendant objected to its introduction, but the objection was overruled.

William Chandler then testified for the prosecution that he had for years been employed by the firm of Chandler & Son, in Cleveland; that in September and October, 1878, he was the head book-keeper of that firm; that he did not know defendant, nor did he ever see him to his recollection; that defendant was not his cousin; that he had never written to defendant in September or October, 1878, or at any other time or place, to inquire from him the price of flour, and that Chandler & Son never dealt in flour at all.

The only question worthy of notice which the record presents is whether the court erred in admitting in evidence the statement of the defendant on the former trial, and the evidence of Chandler to contradict it. The defendant, on the second trial, made no statement whatever.

It cannot be claimed with any reason that giving in evidence the defendant's statement violates any privilege which the statute confers upon him. He gives evidence in this manner on his own behalf, at his option, and is not to be subjected to unfavorable inferences because he withholds it. But when it is in, it is to be treated like any other evidence, and may be contradicted and shown to be false. Defendant has no claim to be protected against the exposure of this falsehood where he indulges in it for his own exculpation. He runs the risk of this exposure when he invents a false defense.

The peculiarity of this case consists in the defendant's statement being put in on the second trial, not by the defendant himself, but by the prosecution. It is not therefore evidence in the case except as the prosecution makes it so, and the prosecution puts it in, not that reliance may be placed upon it, but for the very purpose of showing its falsity. It is proved as a declaration by the prisoner that it may be followed by evidence that he has attempted to deceive and mislead by it. And the question is whether from the statement itself or from the use which was made of it, inferences unfavorable to the prisoner's innocence might rightly be drawn.

It was never doubted that the conduct of a suspected party when charged with a crime may be put in evidence against him when it is such as an innocent man would not be likely to resort to. Thus it may be shown that he made false statements for the purpose of misleading or warding off suspicion; though these are by no means

conclusive of guilt, they may strengthen the inferences arising from other facts. *State v. Williams*, 27 Vt. 724; *Rex v. Higgins*, 3 C. & P. 603; *Rex v. Steptos*, 4 C. & P. 397. So it may be shown that the accused fled to escape arrest, or broke jail or attempted to do so (*Whaley v. State*, 11 Ga. 123), or offered a bribe for his liberty to his keeper (*People v. Rathbun*, 21 Wend. 509). These are familiar cases and rest in sound reason. But the case of deliberate fabrication of evidence, or of attempt in that direction, would seem to be still plainer. In *People v. Marion*, 29 Mich. 31, 39, an objection to evidence that the defendant had attempted to tamper with a witness and with the jury was thought so manifestly baseless that it could scarcely be made seriously. In *Commonwealth v. Webster*, Bemis, 210, anonymous letters written by defendant to mislead the officers were received as bearing upon his guilt. All these attempts to avoid a trial, to evade conviction by frauds upon the law, or to lead suspicion and investigation in some other direction by false or covert suggestions or insinuations, are so unlike the conduct of innocent men that they are justly regarded as giving some evidence of a consciousness of guilt. They do not prove it, but the jury are entitled to consider and weigh them in connection with the more direct evidence. *Toler v. State*, 16 Ohio St. 583, 585.

In this case the prosecution were allowed to show that the defendant had deliberately fabricated a false statement which, if true, would have been sufficient for his full exculpation. What conduct could possibly be more suggestive of guilt? An attempt to escape may be due to fright exclusively; and an effort to direct attention to another may be made in good faith, and in the belief that the other is the guilty person; but this is a deliberate attempt to deceive the court and jury, and while not constituting perjury, because not under oath, it has and was intended to have all the effect of perjury on the case being tried. It betrays a consciousness that unless the jury are made to believe a falsehood, the case against the party is sufficient to convict him, or at least to put him in peril, and it is made when the party has the assistance of counsel, and when he is no longer agitated by the first excitement of the accusation. It presents therefore all the evidences which conduct can furnish in any case, that the accused is in a peril from which straightforward and honorable conduct is not likely to relieve him.

Suppose the defendant on the first trial had relied upon an *alibi*,

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shown by his own evidence, and on the second had gone upon the stand with an admission of his presence, but with some excuse; shall the prosecution be precluded from showing how he has undertaken by his own evidence to prove inconsistent defenses? It seems to me that there can be no just or sensible rule of law that can thus shield falsehood, when it is made use of to mislead justice.

The recorder should be advised to proceed to judgment.

Judgment affirmed.

MARSTON, C. J., and GROVES, J., concurred; CAMPBELL, J., dissented.

AXFORD V. MATTHEWS.

(48 Mich. 327.)

Action—trover—possession by mortgagee.

An assignee for benefit of creditors cannot maintain trover against a United States marshal for goods of the assignor taken by him under attachment from the possession of the assignor's mortgagee.

TROVER. The opinion states the case. The defendant had judgment below.

Wisner & Speed, for plaintiff in error.

Griffin & Dickinson, for defendant in error.

GRAVES, J. AS United States marshal the defendant in error seized a quantity of goods under attachments, and the plaintiff in error, being assignee of the attachment debtors for the benefit of their creditors, brought trover. The verdict went in favor of the marshal.

It was made a question on the trial whether the plaintiff had such possession or right of possession as entitled him to sue in trover, and the case is now to be decided according to the answer which should be given.

Some time prior to the assignment the assignors had mortgaged their stock, and in the course of a day or two after the assignment

the mortgagees took steps to get possession under the mortgages, and to dispossess the plaintiff who was in as assignee. As a consequence, the possession in point of fact became disputed, and each side claimed to be in. During this controversy the marshal levied the attachments. The facts were somewhat equivocal as to whether the agents of the mortgagees or the plaintiff were in possession on these occasions, and the Circuit judge very correctly left it to the jury, and in view of the instructions it is a necessary inference that they found the agents of the mortgagees were in. He also instructed the jury to the effect that in case the mortgages were good and valid, and the agents of the mortgagees were in possession and holding the property under the mortgages when the attachments were levied by the marshal, the assignee could not maintain the action.

Under these instructions the jury must have found that the possession was actually in the agents of the owners of valid mortgages made by the assignors prior to the title of the plaintiff, and that such possession was held under such mortgages, and was adverse and not in subordination to the later title conferred on the plaintiff by the assignment.

There is no pretense that the right to seize and hold possession under the mortgages was not complete as against the plaintiff. On the contrary, the bias of the evidence is toward the fact that it was, and the record contains nothing different. But in any event the court would not assume that the taking and holding by virtue of the mortgages were not lawful, in order to make out error in the record. By necessary construction the possession and right of possession, as against the plaintiff, were in the mortgagees, and of course the implication is unavoidable on the facts that the plaintiff was not in actual possession and had no right immediately to take possession. His position did not bring him within the law of trover and the remedy was not applicable. The view taken by the Circuit judge of the law arising on the facts was correct. The right as between the marshal and the mortgagees was not involved. *Cooley on Torts*, 445; and see *Grove v. Wise*, 39 Mich. 161; *Winslip v. Neale*, 10 Gray, 382; *Lord v. Price*, L. R., 9 Exch. 54; 8 Eng. 505. In the last case the plaintiff had bought a quantity of cotton and paid part of the purchase-price, but the property remained in the vendor's hands, subject to his lien for the amount left unpaid, and a wrong-doer converted part of it. In denying the right of the buyer to maintain trover against him, the court observed that the

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right of possession was in the vendor, so that in case of non-payment, at the proper time, of the amount unpaid, he might resell the goods and repay himself for any loss sustained on the resale. That assuming the goods to have been tortiously removed without the assent of the vendor, the latter might have maintained trover for the same things, and "it cannot be that two men can be entitled, at the same time, to maintain an action for the same goods."

No error is shown, and the judgment should be affirmed with costs.

Judgment affirmed.

The other justices concurred.

BRIGGS V. BRUSHABER.

(43 Mich. 330.)

Action — of fraud in obtaining loan on false security — when lies — damages.

An action for damages for fraudulently procuring a loan on inadequate security may be maintained as soon as the loan is made, and the measure of damages is the difference between the amount of the loan and the value of the securities at the date of the loan, with interest from that time.

ACTION of fraud. The opinion states the case. The defendant had judgment below.

Henry M. Cheever, for plaintiff in error.

George Gartner, for defendant in error.

COOLEY, J. Plaintiff sued defendant for fraud in inducing her by false representations to make a loan to one Ferchow secured by a mortgage on land which was worth much less than the sum loaned upon it. The case was tried by jury, and special findings are returned. The sum loaned was \$450, and for this a mortgage for \$500 was taken. The mortgagor was irresponsible.

The jury found that the fraud was made out by the evidence, and that the plaintiff was entitled to recover. The mortgage however had never been foreclosed, and was still in the hands of the plaintiff as an existing security. Under these circumstances, although

the jury found the value of the mortgaged premises to be only \$250, the court was of opinion that the plaintiff could recover nominal damages only. The view of the judge seemed to be that no actual damages were sustained by the plaintiff, or would be until an attempt to enforce the mortgage had been made, and in whole or in part had proved unsuccessful.

In support of this ruling the case is likened to an action upon a guaranty of collection; but it has no resemblance to such an action. Before suit can be brought on such a guaranty the plaintiff must exhaust his remedy at law, because that is the import of his contract. *Bosman v. Akeley*, 39 Mich. 710; s. c., 33 Am. Rep. 447. But in this case no claim is made upon contract. The plaintiff claims to be damnified by a fraud, and the right to an action is conceded. Nothing is in dispute but the amount of the recovery. We are also referred to *Freeman v. Venner*, 120 Mass. 424, as a case in point. That was an action of tort for inducing the promisee of a note to indorse it in blank, by fraudulent representations as to the legal effect of the indorsements; and it was held that the indorser could not maintain the action until he had been damnified by the indorsement. This case also has no analogy to the present. The indorser might never be charged by demand and notice, and if he was the principal might pay the note, and thereby satisfy the indorser's liability. Meantime the indorser could lose nothing; a contingent liability was hanging over him, and that was all.

In this case the plaintiff was damnified as soon as the loan was made. She had been induced to part with her money for something of much less value than that which it was agreed she should receive for it. The mortgage was a marketable commodity, and she lost by the fraud itself the difference between the market value of that which she received and that which she was to have under the arrangement. It is true this could not be definitely fixed by the evidence; witnesses might disagree respecting it; the market value of lands might rise afterward to an extent that would make the mortgage available to its full amount; but there is nothing unusual in contingencies of this sort being involved in litigation and casting uncertainty upon any attempt to do justice. Had the plaintiff been defrauded in the purchase of a horse, similar questions might arise: the plaintiff might gain or might lose by the evidence convincing the jury that the horse was worth less or more than the real market value, and an unexpected rise in horses might save him from any

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loss at all. But controversies of the sort can only be determined in one way, the jury must judge of the extent of the damage by such evidence of value as the parties may be able to produce, and to postpone a remedy until the time shall arrive when all possibility of error or mistake is precluded, would be grossly unjust and in many cases equivalent to a denial of remedy. The latter might be the case here if the mortgage had been on long time. We think the court erred in limiting the recovery to nominal damages. The plaintiff was entitled to recover the difference between the \$450 loaned by her, and the value of the securities which she received therefor, and to interest upon this sum from the time the loan was made.

The plaintiff moves in this court for final judgment on the findings of the jury, and if these covered the whole case we might award it. Unfortunately it does not appear that in their estimate of the value of the land the jury had in view the time of the loan. The value may have changed materially since that time, and it is possible, if not probable, that the jury made their estimate as of the time the trial.

The judgment must be reversed with costs and a new trial awarded.

Reversed and awarded.

The other justices concurred.

RAYNSFORD V. PHELPS.

(43 Mich. 342.)

Officer — tax collector — liability for false return.

A tax collector is liable for a false return of *nulla bona*, whereby the owner of a mortgage of lands is compelled to redeem from a tax sale.

ACTION for false return. The opinion states the case. The defendant had judgment below.

C. G. & W. W. Hyde, for plaintiff in error.

Simonds & Fletcher, for defendant in error.

COOLEY, J. It was decided in *Rowning v. Goodchild*, 2 W. Bl. 906, that a public officer having ministerial duties to perform, in which a private individual has a special and direct interest, is

liable to such individual for any injury sustained by him in consequence of the failure to perform such duties. It was an officer connected with the postal service who was held liable in that case, and the decision is followed in this country. *Teall v. Felton*, 1 N. Y. 537; s. c., in error, 12 How. 284. Election officers have been held liable on the same ground (*Ashby v. White*, Ld. Raym. 938; 1 Salk. 19; *Lincoln v. Hapgood*, 11 Mass. 350; *Jeffries v. Ankeny*, 11 Ohio, 372); and so have commissioners of highways (*Hover v. Barkhoof*, 44 N. Y. 113; *Hathaway v. Hinton*, 1 Jones N. C. 243); and so have inspectors of provisions (*Hayes v. Porter*, 22 Me. 371; *Nickerson v. Thompson*, 33 id. 433; *Tardos v. Bozant*, 1 La. Ann. 199); and so have tax and other officers (*Amy v. Supervisors*, 11 Wall. 136; *Tracy v. Swartwout*, 10 Pet. 80; *Brown v. Lester*, 21 Miss. 392; *Bolan v. Williamson*, 1 Brev. 181). It is immaterial that the duty is one primarily imposed on public grounds, and therefore primarily a duty owing to the public; the right of action springs from the fact that the private individual receives a special and peculiar injury from the neglect in performance, which it was in part the purpose of the law to protect him against. It is also immaterial that a failure in performance is made by the law a penal offense. *Hayes v. Porter*, 22 Me. 371. The exceptions are of those cases in which the functions of the office are judicial, or partake of the judicial. *Sage v. Lourain*, 19 Mich. 137; *Goetcheus v. Matthewson*, 61 N. Y. 420; *Bevard v. Hoffman*, 18 Md. 479; *Harrington v. Commissioners, etc.*, 2 McCord, 400. But even in these cases the officer is responsible if he acts maliciously. *Gordon v. Farrar*, 2 Doug. (Mich.) 411; *Bennett v. Fulmer*, 49 Penn. St. 157; *Gregory v. Brooks*, 37 Conn. 365; *Strickfaden v. Zipprick*, 49 Ill. 286.

The principle is as familiar as it is sound. It is nevertheless insisted that the present case is not within it. Tax collectors, it is truly said, are chosen because the machinery of government must be kept in motion, and to that end it is essential that the public revenue should be collected. They are chosen therefore and their duties imposed on public grounds, not on private. If through any negligence on the collector's part the State loses a portion of its dues, the officer is responsible to the State for the loss; but it is denied that he owes any duty to individuals, except to abstain, as every citizen must, from committing trespasses on their rights. The question of negligence in the performance of public duties must always concern the public only.

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But conceding that the law creates the office of collector in order that public revenues may be collected, it does not follow that it leaves that officer at liberty to disregard private interests in their collection. When the law prescribes who shall be liable for the payment of taxes, and whose property may be levied upon therefor, it at the same time by implication forbids the officer to seize upon the property of others, or by act or omission make the tax a charge upon such property. The implied prohibition creates a duty in favor of the person whose property is the subject of it, and he is at liberty to buy and sell in reliance upon the duty being performed. He has a right to understand that the officer is commissioned by the law to act only with due respect to the rights of individuals, and that if he acts otherwise and causes special injury, he disobeys his commission and is not within the protection the commission might otherwise give.

The plaintiff owned a mortgage on lands on which a tax was assessed for the year 1874. A warrant was issued for the collection of this tax, and was placed in the hands of defendant for service. The plaintiff's case is that during the life of this warrant, and while the defendant held it, there was personal property upon the land, belonging to one French, who had purchased the equity of redemption after the first Monday of May and before the first Monday of December of that year, from which it was the duty of defendant under the express provisions of the statute to make collection. Comp. L., § 1006. Instead of performing this duty he falsely made return of no goods, whereby the tax became established as a lien upon the land, and the land was sold for its satisfaction. Meantime the plaintiff had foreclosed his mortgage and become owner of the lands, and was compelled to redeem from the tax sale.

Is the plaintiff wronged by this false return? We think he is. It was his legal right that the goods of French should be sold to satisfy the tax, and the law always intends that legal rights shall be respected. Moreover he alone suffered injury from the false return. The public suffered nothing, for the lien on the land remained and was enforced, and the only injurious consequence of the misfeasance in public office was that the tax was collected from one man when the command of the law was that it should be collected from another.

If there is no wrong without a remedy, then it would seem that this action should be supported, for the defendant is the only

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wrong-doer. It may be suggested that the plaintiff might have a cause of action against French for money paid to his use; but this is not clear. The statute does not make the purchaser of land under such circumstances personally liable; it only renders his property subject to seizure during the life of the tax warrant. Payment by defendant did not release the property of French, for it was released by the neglect of the officer which is complained of in this suit. The general rule is that taxes can only be enforced by means of the statutory remedies. *Crapo v. Stetson*, 8 Metc. 393; *Shaw v. Peckett*, 26 Vt. 482; *Camden v. Allen*, 26 N. J. L. 399; *Packard v. Tisdale*, 50 Me. 376; *Carondelet v. Picot*, 38 Mo. 125. But whether or not the rule applies here is immaterial, as this action in either case is well grounded in common law principles.

The judgment must be reversed with costs, and the cause remanded, with leave to defendant to withdraw his demurrer and plead on payment of the costs of demurrer.

Reversed and remanded.

The other justices concurred.

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(43 Mich. 335.)

Highway — obstructing alley — nuisance

A platform in an alley at the rear of a store is not a nuisance in itself. * As obstruction of an alley is not a public wrong.

CONVICTION for obstructing an alley. The opinion states the case.

Wisner & Speed, for plaintiff in *certiorari*.

F. G. Russell and *F. A. Baker*, for defendant in *certiorari*.

MARSTON, C. J. An alley can in no proper or legal sense be considered as a public highway, or be governed by rules relating

*See to same effect, *Beecher v. People* (33 Mich. 280), 31 Am. Rep. 316; *contra*, *Noble v. Nashville* (12 Heisk. 684), 27 Am. Rep. 755, and note, 757.

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thereto. While the city may have and undoubtedly has certain limited rights therein for municipal purposes, yet the public have no general right of way over or through the same. It is designed more especially for the use and accommodation of the owners of property abutting thereon, and to give the public the same unqualified rights therein that they have in and to the use of the public streets would defeat the very end and object intended. *Paul v. Detroit*, 32 Mich. 110.

Any obstruction to the right of passage through or to the proper use of any alley by those entitled thereto cannot therefore be considered as a public wrong. The grievance, if any, is an individual one, for which there may, for a willful and unnecessary obstruction, be a private remedy.

Neither do we think the court could assume as of course that the platform complained of was an obstruction—certainly not a nuisance. On the contrary it may have been a very great convenience to the owner or occupant of the property, and have advanced the very interest and purpose such ways are intended to subserve, by affording means of expediting business done there, very materially, or at all events not causing any unusual inconvenience to the other occupants of the same block in their legitimate use of the alley.

The judgment must be set aside and the proceedings quashed.

Ordered accordingly.

The other justices concurred.

VILLAGE OF MOUNT PLEASANT V. VANSICE.

(43 Mich. 361.)

Municipal corporation — authority to license — constitutional law.

Authority to "license saloons, taverns and eating-houses" does not embrace the sale of intoxicating liquors.

An ordinance for licensing the sale of intoxicating liquors, originally void as in contravention of the Constitution, is not made valid by the repeal of the constitutional prohibition.*

*Compare *Johnson v. State* (3 Lea, 469), 31 Am. Rep. 648.

CONVICTION of illegally selling ardent spirits. The opinion states the case.

Brown & Leaton, for plaintiff in error.

A. Stout, for defendant in error.

GRAVES, J. The defendant was fined fifty dollars and costs by a justice of the peace, and ordered to be imprisoned sixty days in case of non-payment, for the violation of an ordinance of the village making provision for granting licenses for the sale of spirituous and intoxicating liquors, and ordaining that violations should constitute misdemeanors punishable by fines, and in case of non-payment, by imprisonment. He appealed, and the Circuit judge directed an acquittal. The village alleges error.

The incorporating act was approved April 16, 1875 (Local Acts of 1875, p. 533), and it provided that in all things not therein otherwise regulated, the village should be governed by, and its powers and duties be defined by, the general act granting and defining the powers and duties of incorporated villages, approved April 1, 1875. The incorporating act being silent as to the nature and extent of the power conveyed to enact ordinances, the authority depends entirely on the general act. This is not disputed. But the position taken on the part of the village is that by the seventh subdivision of the first section of chapter seven of that law (Pub. Acts of 1875, p. 68), the legislature made provision quite broad enough for the ordinance in question, and that the inhibition in the Constitution of legislation to authorize the licensing the sale of ardent spirits having been removed, the provision of said section seven is now imbued with sufficient force to warrant the ordinance.

The court is not able to assent to this claim. In the first place the general act referred to nowhere assumes to delegate the power to a village council to ordain misdemeanors. But this is not all. The provision cited as authority for the ordinance either purports to have given the power or does not, and if it does not, the ordinance is confessedly without foundation, and on the other hand, if it does, and is in that application therefore void, the same result follows.

In regard to the first alternative the point is considered clear. The power given is "to license saloons, taverns and eating-houses." Nothing is said about permitting the sale of ardent spirits, and we

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cannot impute to the words any covert or hidden sense. It is not possible to contend that saloons, taverns and eating-houses are, in contemplation of law, inseparable from the sale of ardent spirits. The course of legislation for many years proceeded on the idea of a distinction and the courts recognized it. Moreover, when the general law of 1875 was passed the legislature was forbidden to make laws authorizing the grant of license, and it would be a rash thing to impute to it a design to do so on the strength of such language as is used in this subdivision.

The second alternative will justify only a word or two. If the legislature had the purpose to confer the power, and designed that the terms used should have the meaning now claimed for them, the design was in conflict with the Constitution as it then existed, and the sense and scope of the provision were so far null and void. They never were of any force, and were as though they had not been expressed or involved in the language, and the words were left to carry a sense in harmony with the Constitution. The meaning claimed not having been enacted in the passage of the law, because the Constitution forbade it, it has not become a law merely through a change of the Constitution and the lapse of time. *Dewar v. People*, 40 Mich. 401; s. c., 29 Am. Rep. 545; *Ludlow v. Hardy*, 38 Mich. 690.

There is no error and the judgment is affirmed with costs.

Judgment affirmed.

The other justices concurred.

 STUPETSKI V. TRANS-ATLANTIC FIRE INSURANCE CO.

(43 Mich. 373.)

Insurance — vacancy.

A dwelling-house did not become "vacant and unoccupied" when the tenant and his family left it for twelve days to visit a sick daughter, and another person at his request visited it daily and looked after it.*

ACTION on fire insurance policy. The opinion states the facts. The defendant had judgment below.

* See *Herman v. Merchants' Ins. Co.* (81 N. Y. 184), 37 Am. Rep. 488.

John C. Donnelly, for plaintiff in error.

Morgan E. Dowling, for defendant in error.

CAMPBELL, J. Plaintiff sued defendant on a policy of insurance, for the destruction of his dwelling and contents by fire. The policy was by one of its conditions made void if the house should "become vacant or unoccupied" without assent of the company.

The fire which destroyed the property was on September 4, 1879. Plaintiff used the premises as his own dwelling. About ten days before the fire he received a telegraphic dispatch from South Bend, Indiana, announcing that his daughter, who lived there, was dangerously ill, and at the point of death. He with his wife and another daughter at once went there, intending to return, and he did return the next day but one after the fire. A son who was not boarding at home was directed to and did visit the house daily to look after the house and feed the stock.

The court below instructed the jury that this was enough to require the house to be regarded as vacant and unoccupied, and directed a verdict for the defendant.

There is not much authority upon this precise form of condition, but we think it must be construed as it would be usually understood by ordinary persons reading and acting on it. We think it would not convey to an ordinary mind the idea that a house is vacant or unoccupied when it has an inhabitant who intends to remain in it as his residence, and who has left it for a temporary purpose. If the phrases were used in their strict legal sense, no one would imagine that the tenant was not such an occupant as would be liable to the responsibilities attached by law to occupants, or that there was such a vacancy of possession as would suspend possessory rights. It would be burglary to feloniously break and enter the house, and arson to maliciously burn it. There may be less occasion to care for a house in which no one lives than for one tenanted, but a person temporarily absent will usually take some pains to have his premises kept under oversight, and in the present case such provision was made for the domestic animals as well as for the house itself. It would we think be regarded as singular doctrine to hold that families leaving their houses on excursions or other temporary occasions cease to occupy them.

In *Cummins v. Agricultural Ins. Co.*, 67 N. Y. 260; s. c., 23

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Am. Rep. 111; it was held that a removal by a son and his family to his father's house, in the neighborhood of his own, to remain with his mother in his father's house while she needed their company, but with the intention of returning to his own house, which was not dismantled, was not a vacating by a removal of the son's house, although the absence actually continued about three months. It was also held in *Whitney v. Black River Ins. Co.*, 72 N. Y. 118; s. c., 28 Am. Rep. 116, that a saw-mill lying idle for several weeks for lack of water or logs did not thereby cease to be occupied during the intervals, and in discussing the meaning of the terms, reference was made to a school-house in vacation as not ceasing to be occupied for school purposes.

It is not safe to resort to extreme definitions beyond the usual understanding. We think in the case before us the premises did not become vacant or unoccupied, if left for the purpose testified to, and that it was error to charge the jury as was done here.

The judgment must be reversed with costs and a new trial granted.

Judgment reversed.

The other justices concurred.

TILDEN V. BARNARD.

(43 Mich. 376)

Negotiable instrument — signing by agent — personal liability — bona fide holding.

A note for a church debt to A. B., and payable to the order of "A. B., cashier," was signed by him and several others, with the addition of "vestrymen, Grace church," to their respective names. *Held*, the note of the signers, individually and not of the church, and that the bank of which A. B. was cashier could not acquire it as *bona fide* holder.

ACTION on note by Barnard, assignee of Morton. The opinion states the case. The plaintiff had judgment below.

Edgar Weeks and *H. B. Hutchins*, for plaintiff in error.

James B. Eldridge and *Barbour & Rexford*, for defendants in error.

MARSTON, C. J. The court below was undoubtedly correct in so far as the note sued upon was held to be the note not of the church or corporation but that of the individuals who signed it. The promise was not made by the corporation, and the instrument did not pretend to bind the corporation, and the addition to the names of the persons signing would not change the character of the agreement.

The court below did not find that the present plaintiff was or claimed through a *bona fide* holder. On the contrary we think it does appear that if the note was at any time negotiated to the First National Bank, of which Tilden, one of the makers and payee of the note, was cashier, the bank was not a *bona fide* holder. The finding is that the note went into the books of Tilden & Co. or of the First National Bank as the note of Grace church. It may have been entered upon the books, if it ever was, for collection only.

[Minor point omitted.]

The same defense is therefore open to these defendants that would have been if the action had been brought by the payee Tilden. The church was owing Tilden upon a past due indebtedness to the amount of this note which was undoubtedly given upon the supposition that it was the note of the church given for such indebtedness. The indebtedness of the church to Tilden was neither extended nor canceled nor changed in the slightest degree by the giving of this note. In so far as these parties were concerned there was no consideration to support the giving of it. No benefit accrued to them, nor even to the church they thought they were acting for. No injury was sustained from the giving and acceptance of this note by Tilden. His claim against the church remained in full force and in no way affected by the transaction. His legal rights were the same after as before. The case is too clear to require further argument or citation of authorities.

The judgment must be reversed with costs of both courts.

Judgment reversed.

The other justices concurred.

McDonald v. Böeing.

MCDONALD V. BÖEING.

(43 Mich. 394.)

Contract — of employment — unaccepted offer.

The owner of lands, asking M. a fixed price for them, declined to give him a refusal of them, but offered him a commission if he would sell them to other parties. The negotiations were all in writing. M. made no reply to this proposal, but sent a person to the owner to whom he sold directly, at a lower price. *Held*, that M. was not entitled to any commissions.

ASSUMPSIT. The opinion states the case. The defendant had judgment below.

McDonnell & Mann, for plaintiff in error.

Chauncey H. Gage, for defendant in error.

COOLEY, J. The plaintiff sues to recover commissions on a sale of lands. The defendant denies that he ever employed the plaintiff to make the sale on which commissions are claimed, and it is conceded that the defendant made the sale himself; the plaintiff claiming only to have been the procuring cause thereof.

The controversy turns upon the question of employment. The dealings of the parties were exclusively by mail and telegraph. On August 22, 1878, plaintiff wrote defendant, inquiring if his lands on sections 16 and 19, town 22 north, range two west, were for sale, and if so, requesting terms and lowest prices. Defendant replied August 30th that they were for sale; those on section 16 for \$8,500. On the receipt of this letter plaintiff sent a telegram requesting a refusal of the land for twenty days, and stating that he thought he could buy or make a sale — probably the latter. In reply to this the following letter was sent:

“MANISTEE, Oct. 19, 1878.

Mr. Norman L. McDonald:

DEAR SIR — Returning from a trip I find your message. I do not want to give a refusal of any of my lands, but you may go and sell it to good parties, and if you do I will pay you the usual commissions. Please reply and oblige

Yours truly,

WILLIAM BÖEING.”

No reply was ever made to this letter, but plaintiff interested himself in having a man who was looking for land go upon and examine the lands on section sixteen and open negotiations with defendant therefor. The result was that defendant sold the lands personally, on November 9, 1878, for \$7,000. No communication passed between him and the plaintiff after October 19, before the sale by defendant was perfected.

The Circuit judge instructed the jury that as the plaintiff never notified the defendant of the acceptance of the terms of his letter of October 19th, or that he was seeking to sell the lands by virtue of any offer made to him by defendant, the latter was at liberty to proceed and sell the lands himself, without being liable to the plaintiff.

The instruction was correct. No offer to employ another binds the person making it to pay for services unless he is given to understand that the offer is accepted. The right to compensation arises from the parties having placed themselves in the relative positions of employer and employed, and assumed respectively the obligations and duties belonging to those positions. And the contract of employment must always be a voluntary act on the part of the employer and of the employed, coinciding in a common understanding.

The plaintiff never assumed the obligations and duties of an agent, nor was defendant ever notified that he proposed to do so after the request that he might have the refusal had been denied. Defendant therefore had a right to understand that plaintiff had dismissed the subject from his attention, and had no reason to suppose that plaintiff was laboring for commissions or expecting them. On the other hand, if plaintiff had taken advantage of any superior knowledge he may have had of peculiar value in the lands, to purchase them himself at less than their real worth, there could have been no ground on which defendant might impeach the sale as being constructively fraudulent by reason of the obligation which the existence of an agency imposes, that the agent shall disclose to his principal all important facts within his knowledge affecting the value of the land before he purchases. Apparently, so far as defendant knew, the parties when the sale was actually made stood to each other in no fiduciary relations whatever.

It is to be further observed that the sale was not made on the terms on which the defendant had empowered the plaintiff to make

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one. The letter of October 19th must be understood as having been written in view of the price before named; and so construing it, the plaintiff was told in substance: "You may go on and sell for \$8,500, and when you do so I will pay you a commission." But instead of making a sale, plaintiff interested himself in sending a purchaser to defendant, to whom the land was sold for \$7,000. This service may have been valuable, but defendant had never contracted for it, and we have no reason to conclude as against him that he would ever have agreed to pay for it. He might have been willing to pay a liberal commission on a sale at the larger sum, and none at all on a sale such as was made. But speculation on the subject is useless; there was never any proposition to plaintiff that he should act generally in the sale of this land, and the proposition actually made to him, that he procure a purchaser at a named price was never accepted and never acted upon. *Darrow v. Harlow*, 21 Wis. 302; *Fraser v. Wyckoff*, 63 N. Y. 445; *McGavock v. Woodlief*, 20 How. 221.

The judgment must be affirmed with costs.

Judgment affirmed.

The other justices concurred.

MASON V. DUNBAR.

(48 Mich. 407.)

Marriage—wife's right to compensation for services in family.

A wife may recover for services in taking care of her blind and aged father-in-law, residing in her husband's family, in pursuance of an arrangement or understanding to that effect with the father-in-law, fairly made, and assented to by the husband.*

ASSUMPSIT. The defendant had judgment below. The opinion states the case.

O. E. Angstman, for plaintiff in error.

Willits & Critchett, for defendant in error.

*To similar effect *Jones v. Reed* (12 W. Va. 350), 29 Am. Rep. 455. So even as against creditors of the husband. *Peterson v. Mulford*, 36 N. J. 481. But *contra*, *Coleman v. Burr*, 25 Hun, 239.

COOLEY, J. It was decided in *Tillman v. Shackleton*, 15 Mich. 447, approved in *West v. Laraway*, 28 id. 464, that a married woman with the consent of her husband might carry on business on her own account, and be protected in the results thereof against him and against his creditors to the same extent as if she were unmarried. This is the logical result of the statute, which empowers a married woman to hold, sell, mortgage, convey, devise and bequeath as any other person may, any property to which she may become entitled "by gift, grant, inheritance, devise or in any other manner."

It is insisted by defendant that these cases do not rule the present. They decide only that a married woman may carry on a separate business on her own account, and this she may do without encroaching on the common-law rights of the husband to the wife's services, which the statute has left undisturbed, and which is as absolute now as it ever was. The present suit is an attempt to appropriate to her exclusive benefit the services of the wife in the family itself; thereby making her altogether independent of her husband, in the household as well as elsewhere.

But my brethren are all of opinion that no distinction can be drawn between the services of the wife performed in and about the house and those performed elsewhere, as a foundation for a claim to recover for her own benefit. If the husband can consent to her giving her time and attention to the management of a millinery or dress making establishment, or to any other regular business away from her home, and if this makes the business her own, there seems to be no conclusive reason why he may not consent to her making her services in the household available in the accumulation of independent means on her own behalf. He relinquishes his right to her services in the one case no more than in the other, and perhaps in the last case the ordinary course of marital relations is least disturbed. In *Tillman v. Shackleton*, *supra*, the business for which the wife was preparing was that of keeping boarders, and in *Merriwether v. Smith*, 44 Ga. 541, she was to give her personal labor in the cultivation of a cotton crop. In the well-considered case of *Peterson v. Mulford*, 36 N. J. 481, the labor in the proceeds of which the wife was protected was picking berries, boarding children, selling milk, butter, eggs, etc. My brethren think all these cases are well decided, and that they cannot be distinguished from the present.

The plaintiff claims that her husband and herself alternately

took charge of the husband's father, who in his extreme old age was blind and imbecile, and required constant care and supervision day and night, and that it was distinctly agreed between herself and her husband that for her own services she should receive compensation from the father. If such was the fact, and if the father understood the arrangement and assented to it, the court is of opinion that she would be entitled to recover what would be just and reasonable. The husband had the right to give her for this purpose her services, or to refuse to give them at his option; and if he made the gift, the legal right to deal with the father as a stranger might would follow.

But we are all of opinion that the father must have been made aware of the arrangement, and must expressly or by implication have assented to it before he could have been chargeable with any legal claim in plaintiff's favor. The legal presumption is that the wife is employing her services in her husband's interest; and where she is working with her husband, as was the case here, a great wrong would sometimes be done if each might present and recover upon separate claims, when the other party supposed and had a right to suppose he was dealing with the husband alone. It is not enough to show that the husband has given the wife her services, but the other party must also understand that contract relations between himself and the wife exist and that the wife expects compensation.

In the present case there are peculiar reasons why the showing that the father expected to pay for the services should be made. All the parties appear to have been living together in the same house upon the father's farm. They were father and children, presumptively living together as a family, and receiving mutual benefit and comfort from their association, and from the property which they enjoyed in common. No presumption can arise under such circumstances that claims were to be made by either against another for services, or for the ordinary conveniences of life which were furnished. On the contrary we must presume that the parties were residing together on the usual terms of members of one family, and not under any contract relations.

It is claimed by the executor that on the facts sworn to by the claimant and her husband the father was helpless in their hands, and they virtually occupied the position of guardian to him. *Jacox v. Jacox*, 40 Mich. 473; s. c., 29 Am. Rep. 547. Under such circumstances, it is said, they should not undertake to bargain with

him, but should procure the appointment of a legal guardian who could deal with them on equal terms. We agree that if he was an imbecile, they could not bargain with him, and if he was simply weak and exclusively in their care, all bargains should be closely criticised, and the utmost fairness insisted upon. In dealing with him they would have been exposed to serious suspicions, but there was no legal impediment so long as he retained legal capacity.

We all agree that claimant gave some evidence on which she was entitled to go to the jury, and which she should have been permitted to follow with other evidence tending in the same direction.

The judgment must therefore be reversed with costs and a new trial ordered.

Judgment reversed.

The other justices concurred.

MCARTHUR V. LUCE.

(43 Mich. 485.)

Mistake—of facts.

One cannot recover money paid by him, after investigation, upon a claim set up in good faith, but which turns out to be unfounded. (*See note, p. 205.*)

ASSUMPSIT. The opinion states the case. The defendant had judgment below.

Kelley & Clayberg, for plaintiff in error. Money paid under mutual mistake may be recovered back. *Little v. Derby*, 7 Mich. 325; *McGoren v. Avery*, 37 id. 120; *Bend v. Hoyt*, 13 Pet. 263; *Waite v. Leggett*, 8 Cow. 195; *Burr v. Veeder*, 3 Wend. 412; *Wheadon v. Olds*, 20 id. 174; *Kelly v. Solari*, 9 M. & W. 54; *Bell v. Gardiner*, 4 M. & G. 11; *Milnes v. Duncan*, 6 B. & C. 671; *Lazell v. Miller*, 15 Mass. 207; *Millett v. Holt*, 60 Me. 169; *Lawrence v. Am. Nat. Bank*, 54 N. Y. 432; *Kingston Bank v. Ellinge*, 40 id. 391; *Canal Bank v. Bank of Albany*, 1 Hill, 287; *Devine v. Edwards*, 87 Ill. 177; *Bradford v. Chicago*, 25 id. 410; *Allen v. Mayor*, 4 E. D. Smith, 407; *Lewellen v. Garrett*, 58 Ind. 442; s. c., 26 Am. Rep. 74; *Citizens' Bank of Baltimore v. Grafflin*, 31 Md. 507; s. c., 1 Am. Rep. 66; *Mowatt v. Wright*, 1 Wend. 363; *Guild v. Baldridge*, 2 Swan, 295.

McArthur v. Luce.

Turnbull & McDonald, for defendant in error.

MARSTON, C. J. Luce & Co., in demanding that McArthur pay them for logs cut, as they supposed, upon their land, acted in entire good faith. They had a survey made, and according thereto the plaintiff had cut logs over the line. When the claim was made upon the plaintiff he employed a surveyor and they went upon the land and plaintiff then became satisfied that he had cut and taken logs from off defendants' land, and authorized a settlement to be made, which was done. This was in 1871 and all parties rested in the belief that a correct settlement had been made until some time in 1875 when a new survey established the fact that no logs had been cut upon defendants' land and this action was brought to recover back the moneys paid upon the claim of having been paid under a mistake of fact.

Where a claim is thus made against another who, not relying upon the representations of the claimant, has the opportunity to and does investigate the facts, and thereupon becomes satisfied that the claim made is correct and adjusts and pays the same, I think such settlement and payment should be considered as final. If not, it is very difficult to say when such disputed questions could be considered as finally settled, or litigation ended. In the settlement of disputed questions where both parties have equal opportunity and facilities for ascertaining the facts, it becomes incumbent on each to then make his investigation and not carelessly settle trusting to future investigation to show a mistake of fact and enable him to recover back the amount paid. One course encourages carelessness and breeds litigation after witnesses have passed beyond the reach of the parties; the other encourages parties in ascertaining what the facts and circumstances actually are while the transaction is fresh in the minds of all, and a final and peaceful settlement thereof. *Detroit Advertiser & Tribune Co. v. Detroit*, 43 Mich. 116, and *County of Wayne v. Randall*, id. 137.

The judgment must be affirmed with costs.

Judgment affirmed.

The other justices concurred.

NOTE BY THE REPORTER.—See *Fraker v. Little*, 24 Kans. 598; s. c., 36 Am. Rep. 263; *Griffith v. Townley*, 69 Mo. 13; s. c., 38 Am. Rep. 476.

In *Advertiser & Tribune Co. v. Detroit*, *supra*, it was held that a common council empowered to audit and allow all accounts against the municipal corporation is presumed to investigate all claims presented, and to have full knowledge of all existing facts relating

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thereto before allowing them; and having allowed and paid claims without investigation, cannot order an investigation, and rescind their action, and recover back the money, because of unknown facts which they might have ascertained by reasonable diligence. The court said: "Such a doctrine would be productive of endless mischief and litigation. It would encourage the grossest carelessness in the performance of official duties, in reliance upon a future investigation to correct. The rights of third parties would not be safe under such a rule, and no one would ever know whether the allowance of his account was final or not, at least until the statute of limitations had placed the question at rest. In the absence of fraud, the body who is given the power to allow claims, when they have officially passed upon a claim, must be conclusively presumed to have had at the time full knowledge of all the facts pertaining thereto, which a proper investigation would then have disclosed."

The same doctrine was held, in *County of Wayne v. Randall*, *supra*, in respect to county auditors paying a claim after advice that their liability is doubtful. The court said: "The mistake was one of law and not of fact."

See *White v. Hapeman*, *ante*, 178

DEWEY V. ALPENA SCHOOL DISTRICT.

(43 Mich. 480.)

Contract — rescission — act of God.

A public school teacher may recover wages for his stipulated term although the school was suspended on account of small-pox. (See note, p. 208.)

ASSUMPSIT. The opinion states the case. The defendant had judgment below.

Holmes & Carpenter, for plaintiff in error.

Turnbull & McDonald, for defendant in error. A contagious epidemic, like small-pox, is *actus Dei* that will excuse performance of a contract. *Wolfe v. Howes*, 20 N. Y. 201; *Lakeman v. Pollard*, 43 Me. 463; *Stewart v. Loring*, 5 Allen, 306; Bish. Cont. 633. So is sickness or death. *Harrington v. Fall River Iron Works Co.*, 119 Mass. 82, *Jennings v. Lyons*, 39 Wis. 553. Where performance becomes impossible by reason of the non-existence of the subject-matter of the contract, without default of either party, the law excuses it. *Walker v. Tucker*, 70 Ill. 527. Though where the duty is not one imposed by law but by the contract itself, its non-performance is not excused if provision was not made against contingencies. *Mich. Cent. R. R. v. Burrows*, 33 Mich. 13; *Chic., etc., R. R. Co. v. Sawyer*, 69 Ill. 285; s. c., 18 Am. Rep. 613; 2 Chit. Cont. 1078, notes.

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GRAVES, J. The plaintiff was regularly hired by the district to serve as teacher in its public schools for ten months for \$130 per month. He entered on his duties on the 2d of September and continued up to the 10th of December, at which time the district officers closed the schools on account of the prevalence of small-pox in the city, and kept them closed thereafter for the same reason until the 17th of March. They were then re-opened and the plaintiff resumed his duties. He was subsequently hired for the next school year, and his compensation was increased \$100. The district refused to pay him for the period of suspension, and he brought this action to recover it.

The claim was resisted on two grounds: *First*, that on the second hiring it was mutually agreed that the addition of \$100 to his compensation for incoming service should stand and be allowed and accepted in full satisfaction of all claim for pay during the time in question; and *second*, that the suspension was the effect of an overruling necessity, or in other words, the act of God, and that all parts of the contract were suspended for the time being.

The Circuit judge submitted to the jury both questions in a very clear manner, and instructed them to find against the plaintiff in case they were satisfied the alleged compromise was in fact entered into; or in case they should find that the small-pox was so prevalent that it became obligatory on the board to close the schools as a necessary step to prevent the spread of the disease and save human life.

The jury returned a verdict in favor of the district. But we cannot know with legal certainty whether they determined only one of these questions in favor of the district, or whether they so determined both, and of course if one only was so decided it is impossible to say which one. The evidence on the compromise was conflicting, and as it appears in the record the advantage was with the plaintiff. Still if no other ground of defense had been laid, the verdict must have been conclusive. As just explained it is not so now.

The second objection must be briefly considered. Beyond controversy the closing of the schools was a wise and timely expedient; but the defense interposed cannot rest on that. It must appear that observance of the contract by the district was caused to be impossible by act of God. It is not enough that great difficulties were encountered, or that there existed urgent and satisfactory reasons for stopping the schools. But this is all the evidence tended to show

The contract between the parties was positive and for lawful objects. On one side school buildings and pupils were to be provided, and on the other personal service as teacher. The plaintiff continued ready to perform, but the district refused to open its houses and allow the attendance of pupils, and it thereby prevented performance by the plaintiff. Admitting that the circumstances justified the officers, and yet there is no rule of justice which will entitle the district to visit its own misfortune upon the plaintiff. He was not at fault. He had no agency in bringing about the state of things which rendered it eminently prudent to dismiss the schools. It was the misfortune of the district, and the district and not the plaintiff ought to bear it.

The occasion which was presented to the district was not within the principle contended for. It was none of absolute necessity but of strong expediency. To let in the defense that the suspension precluded recovery the agreement must have provided for it. But the district did not stipulate for the right to discontinue the plaintiff's pay on the judgment of its officers, however discreet and fair, that a stoppage of the schools is found a needful measure to prevent their invasion by disease, or to stay or oppose its spread or progress in the community; and the contract cannot be regarded as tacitly subject to such a condition.

The judgment must be reversed with costs and a new trial granted.

Judgment reversed.

The other justices concurred.

NOTE BY THE REPORTER.—There is no doubt that where one agrees to work for another for a certain term, and is prevented by his own sickness or the sickness or death of the other, he is excused from completion and may recover *pro rata*. But a different question arises when the services are to be rendered by or in respect to a third person or in respect to a particular thing, and such person or thing perishes.

Chitty Cont. (11th Am. ed. 832) says: "The destruction of work by an accidental fire or other misfortune, before it is finished or delivered, does not deprive the workman of his right to remuneration, to the extent of the work performed; unless by the express and uniform custom of any particular trade no payment is to be made until the work be completed or delivered."

Thus in *Menetone v. Athawes*, 3 Burr. 1592, a ship was sent to a dock for repairs, but was burned when the repairs were nearly finished. The shipwright was held entitled to recover. The same principle was admitted in *Gillett v. Mancman*, 1 Taunt. 137, an action by a printer, who had undertaken to print a book for another who furnished the paper, and the whole was burned, without the printer's fault, when the printing was nearly done; but his right to recover was denied upon the ground of a contrary usage in the trade.

Chitty Cont. (11th Am. ed. 1076) also says: "Where from the nature of the covenant it is apparent that the parties contracted on the basis of the continued existence of a given

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person or thing, a condition is implied that if the performance becomes impossible from the perishing of the person or thing, that shall excuse such performance."

In *Walker v. Tucker*, 70 Ill. 527, this doctrine was applied to the exhaustion of a coal mine under a contract for working it; and in *Dexter v. Norton*, 47 N. Y. 69; s. c., 7 Am. Rep. 415, to the destruction of a specific lot of cotton, the subject of an agreement for sale and delivery.

In *Stewart v. Loring*, 5 Allen, 303 the promisor, engaging to pay for tuition, was excused by his sickness preventing his attendance.

In *Harmony v. Bingham*, 2 Kern. 99, it was held that a carrier agreeing to transport merchandises is not relieved by the fact that a canal, over which it was intended that transportation should be made, was rendered impassable by an unusual freshet. This was put on the ground that he could have transported by some other route.

In *Knight v. Bean*, 22 Me. 531, the court said, *arguendo*: "If one person should agree to tend and wait upon another personally for a year, and the person to be waited and tended upon should die before the expiration of the time, the other party would be absolved from his undertaking." This principle is illustrated in *Spalding v. Roen*, 71 N. Y. 40; s. c., 37 Am. Rep. 7.

So in *Taylor v. Caldwell*, 3 B. & S. 846, where there was a contract for the use of a certain music hall for concert purposes, the hall being destroyed by fire both parties were held released. And so in *Robinson v. Davison*, L. R., 6 Exch. 269, where the defendant contracted that his wife should play the piano for the plaintiff at a certain concert, and she was prevented by illness, held that the husband was not liable. "The parties must have known their contract could not be fulfilled unless the defendant's wife was in a state of health to attend and play at the concert on the day named."

In *School District v. Dauchy*, 23 Conn. 530, it was held that where one had agreed to erect and complete a school-house by a certain day, and had nearly completed the same, when four days before the time, it was destroyed by lightning, he was not excused. The court said: "We believe the law is well settled, that if a person promises absolutely, without exception or qualification, that a certain thing shall be done by a given time, or that a certain event shall take place, and that the thing to be done or the event is neither impossible nor unlawful, he is bound by his promise, unless the performance before the time becomes unlawful. Any seeming departure from this principle of law (and there are some instances that at first view appear to be of that character), will be found, we think, to grow out of the mode of construing the contract or affixing a condition, raised by implication from the nature of the subject, or from the situation of the parties, rather than from a denial of the principle itself. Such for instance, as a promise to marry, where it must be presumed that the parties agree to intermarry if they shall be alive; or a promise to deliver a certain horse at a future time, and before the day arrives the horse dies; in which case the parties are held to have contracted in view of that contingency. In these and like cases, the court will hold that the parties did not understand that the thing was to be done, unless the life of the persons, or of the horse, was continued." "The act of God will excuse the not doing of a thing where the law had created the duty, but never where it is created by the positive and absolute contract of the party. The reason of this distinction is obvious. The law never creates or imposes upon any one a duty to perform what God forbids, or what he renders impossible of performance, but allows people to enter into contracts as they please, provided they do not violate the law." Precisely such a case with like ruling is *Tompkins v. Dudley*, 35 N. Y. 273.

The liability of a lessee covenanting to keep the premises in repair, to rebuild in case of accidental destruction by fire, is a familiar illustration of the application of this principle.

In *Adams v. Nichols*, 19 Pick. 275; 31 Am. Dec. 137, the same doctrine was held in a case of the destruction by accidental fire of a house which one had contracted to build for another. The court said: "If the defendant suffers from this unfortunate casualty, it is imputable to his own indiscretion in making an improvident contract." The like was held in *Boyle v. Agawan Canal Co.*, 22 Pick. 381, where floods carried away a partly constructed canal embankment. So, in *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 487, where one agreed to manufacture goods for another, the destruction of his mill by accidental fire was held no excuse for his failure. The court said: "There was no physical or natural impossibility, inherent in the nature of the thing to be performed, upon which a condition that

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the mill should continue could be predicated. The article was to be manufactured and delivered, and whether by that particular machinery or in that mill would not be deemed material."

In *Lord v. Wheeler*, 1 Gray, 282, however it was held, distinguishing these last cases, that where one contracts to repair another's buildings, and has nearly completed such repairs when the buildings are destroyed by fire without his fault, he is excused from completion and entitled to compensation *pro rata*. The court said: "It is otherwise where one person agrees to expend labor upon a specific subject, the property of another, as to shoe his horse or slate his dwelling-house. If the horse dies, or the house is destroyed by fire before the work is done, the performance of the contract becomes impossible, and with the principle perishes the incident."

So, in *Oakley v. Morton*, 1 Kern. 25, where one agreed to keep twenty cows for the dairy business, and to deliver the butter made therefrom to the other, he was held not excused from performance by the drying of a part of the cows.

In *School Trustees v. Bennett*, 3 Dutch. 513, contractors agreed to build and complete a school-house, and find all materials therefor, on a designated lot owned by plaintiff. When the building was nearly completed, it was blown down by a sudden and violent gale of wind. The contractors again began to erect the building, when it fell, solely on account of the soil on which it stood having become soft and miry and unable to sustain the weight of the building; although when the foundations were laid, the soil was so hard as to be penetrated with difficulty by a pickaxe, and its defects were latent. The plaintiff had a verdict for the amount of the installments, paid under the contract as the work progressed. The verdict was sustained by the Supreme Court, which held that the loss, although arising solely from a latent defect in the soil and not from a faulty construction of the building, must fall on the contractors. The court said: "That where a party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. * * * If before the building is completed or accepted, it is destroyed by fire or other casualty, the loss falls on the builder; he must rebuild. The thing may be done, and he has contracted to do it. * * * No matter how harsh and apparently unjust in its operation the rule may occasionally be, it cannot be denied that it has its foundations in good sense and inflexible honesty. He that agrees to do an act, should do it, unless absolutely impossible. He should provide against contingencies in his contract. Where one of two innocent persons must sustain a loss, the law casts it upon him who has agreed to sustain it, or rather, the law leaves it where the agreement of the parties has put it. * * * Neither the destruction of the incomplete building by the tornado, nor its falling by a latent softness of the soil, which rendered the foundation insecure, necessarily prevented the performance to build, erect and complete this building for the specified price. It can still be done, for aught that was opened to the jury as a defense, and overruled by the court."

In *Dermott v. Jones*, 2 Wall. 1, the foundation of the building sank, owing to a latent defect in the soil, and the owner was compelled to take down and rebuild a portion of the work. The contractor having sued for his pay, it was held that the owner might recoup the damages sustained by his deviation from the contract. The court refer with approval to the cases cited, and say: "The principle which controlled them rests upon a solid foundation of reason and justice. It regards the sanctity of contracts. It requires a party to do what he has agreed to do. If unexpected impediments lie in the way, and a loss ensue, it leaves the loss where the contract places it. If the parties have made no provision for a dispensation, the rule of law gives none. It does not allow a contract fairly made to be annulled, and it does not permit to be interpolated what the parties themselves have not stipulated." The last two cases were followed in *Steer v. Leonard*, 20 Minn. 494, where the circumstances were similar.

So, in *Clark v. Franklin*, 7 Leigh, 1, a carpenter agreed to build a house for another by the piece and not for an entire gross sum, the other furnishing the materials; the house was blown down before completion; held, that he was entitled to compensation *pro rata*. The court said: "No man can be bound to insure the property of another, but by contract express or implied, and on adequate consideration. Now in this case the property was emphatically Clark's. As soon as the house was raised it became a part of his freehold

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Nay, more, the timbers and all the materials were his, for they had been furnished by him. And on to the work, that became his property at every step of its progress; for every shingle that was laid on, and every plank that was laid, because in its new condition — fashioned and improved as it was, and applied to its proper place in the building, by the skill and industry of the workman — the exclusive property of Clark. It was Clark's house then that was blown down, and Clark must abide the loss, unless Franklin was by contract, express or implied, engaged to abide and insure against the risk. Were it otherwise, the destruction of the house by tempest, where but a single pane of glass alone was wanting to its completion, would equally fall upon the workman." "Was such an engagement implied? I think not. If the builder has undertaken to furnish the materials, and to build the house out and out for a gross or lumping sum, there might be more reason for the suggestion that there was a contract of hazard; we might suspect that the gross sum agreed for covered perhaps the hazard, which the builder might be supposed to have taken upon himself from the form of the contract. But here is a contract by the measurement — by the piece; a contract for the mere compensation usually allowed for labor and skill bestowed. There is no room to imply that a premium was given for the risk, and therefore there is no room to imply insurance or agreement to abide the risk." Precisely like this was *Wilson v. Knott*, 3 Humph. 473, where the like ruling was made. The court said: "It is not like a case where a contractor is to furnish materials, and do the work and control the whole operation, and when finished and delivered to be paid for it." To the same effect, *Nibbs v. Binnes*, 3 Abb. Ct. App. Dec. 875.

But in *Bunnby v. Smith*, 3 Ala. (N. S.) 123, where a workman agreed to perform and complete the carpenter work on a house for another, for a gross sum to be paid on completion, the employee furnishing the materials, and the house was destroyed by fire, without the workman's fault, before completion, while in the employer's possession, it was held, that the workman could not recover *pro rata*. The court said: "The labor was not to be paid for until the work was completed, and if this is rendered impossible, without the act of the employer, there can be no recovery for the work actually done." Quoting Story on Bailm., § 426, "the thing should perish to the employer, and the work to the mechanic."

In *Cook v. McCabe*, 53 Wis., it was held, disapproving *Brumby v. Smith*, *supra*, that where one having nothing to do with the painting, glazing, carpenter or joiner work, contracted to furnish materials for the mason work of a building and perform the labor thereon, except that the owner for whom the same was to be constructed, was to furnish, upon the ground, all the sand, stone, and a certain quantity of lime, and haul all the brick, and the building not being in the exclusive possession of such contractor, just before completion was destroyed by fire, without the fault of the contractor, the loss must fall upon the owner, especially where he had the same insured at the time for his benefit; and such owner cannot require the completion of the balance of the building without restoring the parts which were so destroyed.

In *Burrett v. Dutton*, 4 Campb. 333, it was held that performance of an absolute undertaking by a freighter to load and discharge a ship in thirty days was not excused by impossibility occasioned by ice in the Thames. "Whether it was or was not possible for him to do so from the state of the weather is quite immaterial." But in this case it was also held that the freighter was not liable for delay in the owners getting clearances, that being the owner's duty, and rendered impossible by the burning of the custom house. So a contract to deliver at a port implies delivery at a wharf or the like, and such delivery is not excused by prevention by ice. *Hodgdon v. N. H. & H. R. Co.*, 46 Conn. 376; s. c. 33 Am. Rep. 21; *Aylward v. Smith*, 2 Low. 192; nor by low water, *Parker v. Winslow*, 7 Ell. & B. 940.

So in *Simbrick v. Salmond*, 8 Burr. 1637, where an agreement to proceed with a vessel to a certain port was rendered impossible of performance by contrary winds and bad weather.

In *Burke v. Hodgson*, 3 M. & S. 367, it was held that the charterer of a ship, who covenants to send a cargo alongside at a foreign port, is not excused from sending it alongside, though in consequence of the prevalence of an infectious disease at the port, all public intercourse was prohibited by law, and though he could not have had communication without danger of contracting and spreading the disorder. In this case counsel cited a case from Rolle holding that "If a man covenant to build a house before such a day, and afterward the plague is there before the day, and continues there till after the day, this shall

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excuse him from the breach of the covenant for not doing thereof before the day, for the law will not compel him to venture his life for it, but he may do it after."

In *Beaton v. Shank*, 3 East, 232, where a charter-party required the keeping of a certain number of men on board as the crew, and some deserted and others died, it was held no excuse. The party was bound to provide against the contingency of any of them dying, as by taking an extra number of hands on board."

In *Lakeman v. Pollard*, 43 Me. 483, the plaintiff contracted to work for the defendant for a specified time, but left before, on account of the prevalence of cholera in the vicinity. He was allowed to recover *quantum meruit*. The court said: "The plaintiff was under no obligation to imperil his life by remaining at work in the vicinity of a prevailing epidemic so dangerous in its character that a man of ordinary care and prudence, in the exercise of those qualities, would have been justified in leaving by reason of it." (The principal case would have been analogous to this, if the teacher had refused to teach on account of the prevalence of the small-pox, and this case would have justified a recovery *quantum meruit*.)

MCCUTCHEON V. HOMER.

(43 Mich. 483.)

Municipal corporation — nuisance — defect in highway.

A city is not liable in damages for bringing an existing nuisance within a street by widening the street.

A city is not liable for an injury to an individual by neglect to keep its streets in repair.

TRESPASS on the case. The opinion states the case. The defendant had judgment below.

John C. Patterson and *Wm. H. Brown*, for plaintiff in error.

Byron Smith and *James H. Campbell*, for defendant in error.

COOLEY, J. The record in this case presents two questions of law. The first of these is, whether a municipal corporation is liable as for misfeasance in extending the bounds of one of its streets by widening it; thereby bring an existing nuisance within the street limits. This question is answered by repeated decisions of this court. The action which widened the street was legislative, and no charge of misfeasance can be predicated thereon. *Larkin v. Saginaw County*, 11 Mich. 88; *Pontiac v. Carter*, 32 Mich. 164; *Detroit v. Beckman*, 34 Mich. 125; s. c., 23 Am. Rep. 507; *Lansing v. Toolan*, 37 Mich. 152.

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The second question is whether such a corporation is liable for the injury sustained by an individual in consequence of the neglect to put and keep one of the public ways in repair. This, it is conceded, was decided in the negative in *Detroit v. Blakeby*, 21 Mich. 84; s. c., 4 Am. Rep. 450. It is said however that the decision in that case was by a divided court, and it is urged that it should be reviewed in the light of more recent decisions.

The case of *Blakeby* was very fully and carefully considered, and there can be no ground for supposing that either of the judges participating therein has since changed the opinion then deliberately formed and expressed. The case was decided on the concurring opinions of a majority of the court, and the decision is authoritative. There has been a change in the court since that time, but it would be mischievous in a high degree to permit the re-opening of controversies every time a new judge takes his place in the court, thereby encouraging speculation as to the probable effect of such changes upon principles previously declared and enforced in decided cases. Nothing is more important than that the law should be settled; and when a principle has once been authoritatively laid down by the court of last resort, it should be regarded as finally settled. If the court itself desires a reargument, it is to be presumed it will be ordered when the occasion presents itself; but unless that is done, a deliberate decision should not be regarded as open to controversy.

The judgment must be affirmed with costs.

Judgment affirmed.

The other justices concurred.

WEBBER V. TOWNLEY.

(43 Mich. 534.)

Public records—right to copy.

One has no right to copy public records for the purpose of compiling abstract books for sale for private emolument.

MANDAMUS. The opinion states the case.

Beakes & Cutcheon, for relator.

Thomas A. Wilson and Eugene Pringle, for respondent.

MARSTON, C. J. The relators show by their petition that in November, 1879, they entered into a copartnership for the purpose of making and owning a complete abstract of the title to all the lands in Jackson county, and for the purpose of carrying on the abstract business at Jackson in said county; that they had called upon the respondent, who was and is register of deeds in said county, and stated to him fully and fairly the purpose of petitioners, and asked permission to put a table in one of the rooms in the office of said register, which was granted; that petitioners thereupon contracted for certain blank books and incurred considerable expense, and commenced copying from the public records into such books, and continued so to do until about January 15, 1880, and that this was done without the slightest interference with or hindrance to the business of the office of said register; that at the date last mentioned the respondent informed a clerk then in the employ of said relators at such work that respondent would not allow him to work any more, because it would be unfair to the owner of another set of abstract books in which respondent was interested, and since then relators have been unable to further prosecute their said work. The relators further set forth that in doing such work they have not used pen or ink, or permitted their clerks to, using pencils only, and are willing to comply with all reasonable rules and regulations which the register may prescribe. They further allege that the public records of said office embrace one hundred books of records of deeds and about sixty of records of mortgages, to be abstracted; that the making of a proper abstract will be a work of great labor, and if done by one person without assistance would require several years for completion. They allege an intention to make a complete abstract, which would be of great benefit to the public and themselves. The relators ask for a peremptory writ of mandamus to compel the register to permit them and their clerks to inspect and copy or abstract the public records, files and papers in the office of the register, subject to reasonable rules and regulations as to time, facilities, etc.

An answer was put in by the respondent to which a number of exceptions have been taken by relators' counsel, but which we shall not consider, preferring to dispose of the application upon its merits and without any reference to side issues, assuming for this purpose that sufficient facilities could be afforded relators in the register's office to make an abstract, even although, as stated in the answer, it would require two persons five years to make such abstract.

The relators place their right to the relief asked upon two grounds: *First*, that the right to inspect public records and make transcript therefrom is given them by the common law; *second*, under Act No. 54 of the Session Laws of 1875, p. 51.

We are of opinion that under the common law relators have not the right claimed. The right to an inspection and copy or abstract of a public record is not given indiscriminately to each and all who may, from curiosity or otherwise, desire the same, but is limited to those who have some interest therein. What this must be we are not called upon in the present case to determine. The question has usually arisen where the right claimed was to inspect or obtain a copy of some particular document, or those relating to a given transaction or title. We have not been referred to any authority which recognizes the right of a person under the common law to a copy or abstract of the entire records of a public office in which he had no special interest, the object in view being simply private gain from the possession and use thereof.

The object sought by the relators may be considered as of such modern origin as not to have been contemplated or covered by the common-law authorities relating to the inspection of public records, and the reason upon which those authorities rest would exclude relators from the right claimed. What is the right which relators seek, and the result thereof? But first let us see what it is not. It is not for a public purpose. They do not seek these abstracts for purposes of publication for the use, benefit, or information of the public, even if such an unlimited publication could be justified. Relators do not ask for an inspection of a record and abstract thereof relating to lands in which they claim to have any title or interest, or concerning which they desire information in contemplation of acquiring some right or interest, either by purchase or otherwise. It is not as the agents or attorneys of parties seeking information because interested or likely to become so. On the contrary, the right is based upon neither a present nor prospective interest in the lands, either personally or as a representative of others who have, but is for the future private gain and emolument of relators in furnishing information therefrom to third parties for a compensation then to be paid. It is a request for the law to grant them the right to inspect the record of the title to every person's land in the county, and obtain copies or abstracts thereof, to enable them hereafter, for a fee or reward, to furnish copies to such as may de-

sire the same, whether interested or not, and irrespective of the object or motive such persons may have in view in seeking such information. In other words, relators ask the right of copying or abstracting the entire records of the county for private and speculative purposes, they having no other interest whatever therein.

Conceding to them this right under such circumstances, the same must be accorded to all others asking it. Every resident of Jackson county may of right claim a similar privilege. Indeed, the right for such purpose, if it exists at all, cannot be restricted by the residence of the party, so that the result may be more applicants than the register's office could afford room to. Further than this, to make such abstracts being thus open to all, and being a matter of right, must be granted in such a manner, and such reasonable facilities must be afforded, that the right claimed and exercised will not be barren but profitable. If none but the applicants are permitted to work, the time consumed in making the abstract will, in many counties, be so long that the full fruits thereof cannot be reaped during the life-time of the parties. An opportunity therefore should be afforded to all to have the work done within a reasonable time. If therefore each applicant, with a corps of assistants and clerks, makes demand upon the register for facilities to prepare abstracts, may not that officer find his position a somewhat embarrassing one, and his office uncomfortably crowded, to his inconvenience and that of the public? If however this is a matter of right, open and common to all, and which may be enforced by mandamus, must not the proper authorities in such county furnish suitable room and facilities to accommodate all who may desire to exercise this right? If not, and there is to be any discrimination, who shall be favored, who shall be admitted and who excluded? How may clerks or assistants shall each applicant have the right to employ? Who shall determine what shall be considered a reasonable time within which each may complete his abstract? And as the use of the public records cannot thus be handed over to the indiscriminate use of those not interested in their future preservation, how shall the register protect them from mutilation? This he cannot do personally without neglecting his official duties, and if he must employ clerks or appoint deputies for such purposes, at whose expense shall it be, the law having made no provision for such emergencies?

These and many other embarrassing questions must arise if this right is found to exist.

Webber v. Townley.

It would not however end here. This being a right which we might term one not coupled with an interest, must apply equally to the records in each and every public office. True, the copies or abstracts from each of the several public offices might not be so profitable to the parties making the same as would those from the register's office, but this would not go to the right to make the abstract. May then parties in no way interested, other than as are these relators, insist upon the right to inspect and copy or abstract the records of our courts, of the treasurers of our counties, of the several county offices; and indeed why with equal propriety may it not be extended to a like right in each of the several State offices? The right once conceded, there is no limit to it until every public office is exhausted. The inconveniences which such a system would engraft upon public officers, the dangers, both of a public and private nature, from abuses which would inevitably follow in the carrying out of such a right, are conclusive against the existence thereof.

It may be said, that even admitting the right to exist, there would be no such number of persons desirous of making abstracts, and that the dangers pointed out would not therefore arise, and in corroboration thereof the past may be referred to. How far the uncertainty of the existence of such an unlimited right in the past may have kept the number of applicants within proper bounds, may have some bearing upon the question, and it may be true that the demand for abstracts of title would have some effect upon the supply offered for sale. We must bear in mind however that the larger and more populous the county, the greater would be the demand, and because of the larger number of volumes of records in such a county, a correspondingly increased time and force would be required for each person to perfect his abstract, and the greater danger from abuses exist. Besides in ascertaining whether the right exists, we have a right to inquire into the evils which it would be likely to lead to, and may for this purpose follow up the natural and probable consequences likely to result therefrom, and thereby determine whether justified by the principles of the common-law decisions.

[Omitting the statutory consideration.]

It follows that the writ must be denied with costs to respondent.

Writ denied.

The other justices concurred.

THOUBBORON V. LEWIS.

(48 Mich. 635.)

Contract — for printing — discretion as to design.

A sign printer submitted to a customer a design for some fancy signs or show-cards, containing two sides of a shield. The customer returned it, with the word "established" written on one shield, and "1875" on the other, with some other suggestions, and a request for "something of that style," "a clean neat label," and "something to beat" a rival manufacturer's signs. The signs were executed, with the word and figures in question at the top, instead of on the shield. *Held*, a compliance with the contract.

ASSUMPSIT. The opinion states the case. The defendant had judgment below.

James O'Brien and Atkinson & Atkinson, for plaintiff in error.

Henry A. Harmon and H. A. Chaney, for defendants in error.

GRAVES, J. The defendants, who are bakers in Detroit, refused to accept and pay for a quantity of fancy signs made for them by the plaintiff, an ornamental sign painter in New York. The negotiation between the parties was carried on by correspondence. The defendants, under date of April 12, 1879, wrote for samples of show-cards about the size and style of Hathaway & Son's "Gloss Polish" card, with black ground and red letters, leaving out the picture and putting in "plain, bold letters." The plaintiff replied under date of the 14th, and inclosed a sample of signs just made for a coffee house, and observed that he could design for defendants' trade, and finish up in the style of coffee-house sign, at certain rates specified.

The defendants, under date of the 17th, sent a rough plan, which they desired the plaintiff to sketch for them and return as soon as possible, when, as was added, "we will send you order for same," and the plaintiff thereupon drew a pencil sketch and sent it on the 21st. On receipt of this the defendants wrote on the 28th, "Inclosed we return you sketch for label with the words 'Established 1875' added," and on inspecting the sketch the word "established"

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appeared in written characters on one side of the shield and the figures "1875" on the other. The communication proceeded as follows: "We would like to have our name and crackers a little more prominent; that is, have the letters shaded so they will stand out bold and distinct, viz.: [giving a pen and ink illustration of the style of letter meant], "or something of that style. Please advise us when we can expect them. Give us a clean, neat label."

The plaintiff replied May 1st that he would make the alteration required and get the signs out without delay, and suggested that it would take about two weeks. A week later the defendants wrote that they have been told that some show signs faded soon, and they desired him to use a color which would not fade by exposure to the sun; and nearly a week thereafter they wrote again that a person whom they named was then at work on a show-card for certain establishments who were competitors of defendants, and they observed: "We want something that will beat theirs." "C. [the person getting up the other card] said yours would all fade out in a short time."

The plaintiff five days later forwarded from New York to defendants one thousand and thirteen of the signs, and on their arrival at Detroit the defendants refused to accept them, among the grounds of their refusal the most material was that the word "Established" and the figures "1875" were placed at the top instead of being put in the positions where they were noted on the sketch by defendants. The plaintiff then brought this action for the price, and the jury, under a charge which in substance required them to find for defendants, unless, in their judgment, the defendants left the placing of the new matter before mentioned to the plaintiff's discretion, returned their verdict in the defendants' favor.

The essential question is whether the learned judge, in leaving this point to the jury, and they in deciding it as they did, committed an error, and on full consideration, we think they did. That the place assigned to the added word and figures by the plaintiff was in better taste than the original, and that the card so shaped stood a better chance than it would have done otherwise to "beat" the signs preparing for the other bakers, has not been disputed. The word "established" containing eleven letters, and the date of the year only four figures, the appearance of the long word on one side of the shield, and the short date on the other, would

involve irregularity and breach of harmony, and would cause more or less offense to the eye.

But defendants contend, as they did below, that the agreement was fixed and absolute in requiring the added matter to be set down exactly were they had noted it on the sketch, and that artistic ideas were not admissible to overrule the stipulation; that they were entitled to have their own way, and to stand on strict compliance with the bargain, whether the production would be more or less pleasing to artists and amateurs.

The right of the defendants to insist upon substantial observance of the contract in every particular is of course not disputed. But the question is, by whom and how shall the contract be interpreted? As it depended on written and not oral materials, and they called for no expository aid beyond a consideration of the interior and surrounding circumstances, it was for the court, and not for the jury, to decide whether the plaintiff was authorized to fix the position of the word and figures in question.

And it only remains to speak of the interpretation called for. The negotiations being by letter and between business men, and not being conducted in the phraseology of lawyers, or with the care about expression generally observed in formal documents, it is not safe and would not be fair to test it by any technical rules. It is a case for equitable interpretation, and the proper course is to look at all the circumstances, and then read the arrangement as the defendants were bound to consider it as understood by the plaintiff. *Mizner v. Kussell*, 29 Mich. 229-231; *Potter v. Ontario & Livingston Mutual Ins. Co.*, 5 Hill, 147; *Barlow v. Scott*, 24 N. Y. 40; *Hoffman v. Aetna Ins. Co.*, 32 id. 405-413; *Gunnison v. Bancroft*, 11 Vt. 493; 2 Kent Com. 557; *White v. Hoyt*, 73 N. Y. 505.

He was a skilled designer and printer of fancy signs, and the defendants sought his service because he was so, and because they were not artists in that line. They believed he had special qualifications, not only for executing, but also for designing, and they felt that to attain their object it would be expedient to confide much to his taste and judgment. Whilst they might indicate the ends they sought, it would be requisite to leave to his decision in a considerable degree the final choice of the proper means. They wanted something superior to their neighbors, and it was expected of him to draw upon his ability to satisfy them. In referring to the lettering they explained that they desired to have the letters shaded so they

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would stand out bold and distinct ; but instead of confining him to any precise method they told him they wished "something" of the style of the pen and ink illustration, and concluded by saying, "give us a clean, neat label "

By this they required his judgment of what would be "clean and neat," and impliedly excluded his employment of any thing or any arrangement which in *his* view would be unseemly and out of proportion. Again, they requested that he would use durable colors, and so inferentially referred the selection in that regard to his judgment. And finally, they desired that he would provide a card that would "*beat*" the signs their neighbors were getting up.

Now these various observations and directions, when viewed, as it was natural they should be, in the light of all the facts, were obviously and directly calculated to impress him with the notion that he was allowed discretion wherever he was not positively instructed, and that he was not expected to display the added matter in any predetermined position, or in any way which according to his judgment would mar the effect and constitute a blemish. The whole grouping had been left substantially to await his suggestions, and the interference of the defendants had been confined to ideas of style.

When they received the sketch they were careful to point out certain changes in the letters to be employed, and to specify certain effects they desired to have produced, but were silent as to the position the new matter should occupy. The only thing which might have indicated that they preferred any special position for it was the fact of its being noted on the sketch as before mentioned. But the other circumstances were too expressive of the purpose that the plaintiff should use his own judgment, to leave any room to claim that he understood or was bound to understand from the fact referred to that the new matter was required to be printed where it was noted.

Considering the situations of the parties relative to each other, and what they were negotiating about, and in what manner, the conclusion is just that it was incumbent on the defendants to make known distinctly to the plaintiff that the word and figures in question must be inserted where they were noted, if it was meant to hold him to a literal adherence in that respect to the sketch. They did not do so, but gave their correspondence such shape as to authorize him to infer that he was to make a change, if neatness, in his judgment, required it.

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On the whole, the jury ought to have been instructed that the placing of the word "established" and the accompanying figures "1875," was left to the reasonable discretion of the plaintiff.

The judgment must be reversed with costs and a new trial ordered.

Judgment reversed.

The other justices concurred.

 NELSON V. CHEBOYGAN NAVIGATION COMPANY.

(44 Mich. 7.)

Constitutional law—improvement of navigable streams—tolls.

It is competent for a State legislature to authorize private parties to charge tolls for the use of improvements made by them in the channel of a navigable river within its boundaries.*

SUIT for tolls. The opinion states the case. The defendant had judgment below.

Watts S. Humphrey and Atkinson & Atkinson, for plaintiffs in error.

G. W. Bell and C. I. Walker, for defendants in error.

COOLEY, J. This is a suit to recover of the defendant a considerable sum of money which the plaintiffs have paid under protest, as tolls for passing through a canal around a dam constructed by defendant across the Cheboygan river about a mile above its mouth where, before the construction of any dam, there were rapids. To an understanding of the legal questions it is necessary to have some knowledge of the water-courses which find an outlet by way of this river.

The stream named the Cheboygan is eight miles long, passing from Mullett lake to Mackinaw straits. Mullett lake is twelve miles long by three or four wide, and is connected with Burt lake

*To same effect, *Carondelet Canal and Nav. Co. v. Parker* (29 La. Ann. 430), 29 Am. Rep. 839.

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of like size by Indian river, a stream five miles long. Crooked river, five miles long, connects Crooked lake, six miles long and a mile wide, with Burt lake. Round lake, about a mile in diameter, is near Crooked lake and connected with it. About five miles above the mouth of the Cheboygan river, Black river comes into it. This is a stream sixty miles long, and passes through Black lake, which is ten miles long and three wide. Rainy river, thirty miles long, empties into Black lake. Pigeon river, forty miles long, empties into Mullett lake. Sturgeon river, seventy miles long, empties into Indian river. Maple river, thirty miles long, empties into Burt lake. Two small steamers, capable of carrying a hundred passengers each, navigate the waters from the head of Crooked lake to the straits of Mackinaw. All the waters mentioned are made use of for floating logs and lumber on their way to the place of manufacture or to market, and vessels drawing five feet of water run up to the head of Mullett lake, and those drawing two and a half feet to the head of Crooked lake. Freight boats and lighters are also on Black river.

In the year 1847 a dam was built by one McLeod across the Cheboygan river where that of the defendant now stands. It was not so high as defendant's dam now is, but high enough to raise the water so that such craft as the plaintiffs now make use of on the river could navigate it to Mullett's lake. The case does not show how or why McLeod came to build this dam, nor how the defendant comes to be now in possession of its site with a higher dam. In 1867 an act of the legislature was passed to provide for the incorporation of slack-water navigation companies for the improvement of rivers in the counties of St. Joseph, Cass, Berrien and Cheboygan, and in the following year defendant was organized and constructed the dam complained of. By the act of incorporation any company that should be formed was authorized to take possession of any navigable river proposed to be improved, and to improve the same by the erection of dams and the construction of locks, and it was provided that "said river, when so improved, and the lock constructed by such company, shall be deemed and taken to be public highways, and free to all persons whatever, to pass and repass with their boats and other water craft, and with their produce, goods and chattels, wares and merchandise, such persons conforming to such rules and regulations as may be established by the company for the navigation of such river, and paying such tolls as may be established

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and required for the same by such company." 2 Laws of 1867, p. 840. As the act did not in any way limit the tolls that might be charged by the companies formed under it, or confer upon any public officer or authority the right to limit them, or to supervise the action of the companies in any manner, it was in effect an act to transfer to voluntary organizations the control of navigable streams, with power to levy burdens upon commerce at discretion, and was probably inoperative under the principles laid down in *Ames v. Port Huron, etc., Co.*, 11 Mich. 139. But in 1871 this power was restricted, and a schedule of tolls which might be charged was fixed by legislation. General Laws of 1871, p. 176. The constitutional validity of these acts was contested, but the lawful existence of defendant as a corporation was affirmed in *Nelson v. Cheboygan, etc., Co.*, 38 Mich. 204.

To prove a personal grievance the plaintiffs gave evidence tending to show that they owned a mill above the dam, and used in their business a tug and several lighters; that in 1876 the tug made a hundred and sixteen trips each way, and the lighters two hundred and six trips up and two hundred and four trips down; that in 1877 the lighters made forty-eight trips up and forty-nine trips down; that in going up they were light and drew ten to twelve inches of water; that in going down they were loaded and drew from three to three and a half feet of water; that plaintiffs sent over the waters of the Cheboygan in 1876, 7,596,000 feet of lumber and a considerable quantity of wood, bark and shingles, 1,151,000 feet of the lumber being shipped on the lighters and the remainder on rafts to the mouth of the river; that the dam, so far as vessel navigation and rafts were concerned, completely obstructed the stream, and to get around it with their tugs, lighters and merchandise, plaintiffs were compelled to use defendant's canal, for which defendant compelled them to pay tolls, amounting in all to \$2,767.70; that in the natural stage of water in the Cheboygan river without any dam the lighters used by the plaintiffs could have passed in the condition they were in on their trips—that is, unloaded—and that rafts of lumber could have been run down. This constituted the case for the plaintiffs.

It was decided in *Benjamin v. Manistee River, etc., Co.*, 42 Mich. 628, that the State might lawfully authorize corporations to make improvements of navigable rivers and to charge tolls for the use of the same, notwithstanding the compact in the Ordinance of 1787

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that the navigable waters of the North-west Territory should be forever free. The tolls, it was said in that case, are not charged for the use of the navigable river thus made free, but are imposed in respect of the improvements, and to obtain the benefit thereof, and the compact itself might have been a curse to the Territory instead of the blessing it was meant for, had it required the water highways of the Territory to remain unimproved in order that they might be used in their natural condition without toll or impost. That case governs this, to the extent at least of determining the general question of the right to take tolls.

But it is insisted on the part of the plaintiffs that the right to the free navigation of public streams must still exist, notwithstanding the improvements, as to whatever property or vehicle of commerce might previously have navigated them. Also that defendant can have no right to stop at its dam and require tolls for the passage through its canal of that which before the dam was built would have floated in the river at that point, thereby making the improvement a burden on such navigation as did not need it. The true construction of the act under which defendant is organized is claimed to be, to give the company a right to charge tolls to those who need and use its improvements, and it is only permitted to obstruct such navigation as the stream in its natural condition is capable of, on condition that it provides locks for getting around its obstructions, and makes them free.

We do not think the broad question which the plaintiffs attempt to raise is in the case. There was no attempt in the court below to show that the commerce carried on by the plaintiffs was not facilitated by the improvement, or that any portion of it was burdened with tolls for the use of that which did not benefit it. It was shown, negatively at least, that the tug and lighters required the facilities of the canal in passing down, and though it was proved the lighters could have passed up unloaded before the dam was constructed, it did not appear that their going up, when they could not also go down, would be of advantage to the interest of any one. The rafts, it was shown, could have passed down before, but whether as conveniently and safely did not appear. It is consistent with every thing appearing in the record that every use made by the plaintiffs of the river was facilitated by the construction of the dam and canal. If they were so, the exaction of tolls for the use of the canal was as proper and just as it would have been if the

dam had first made the use of the waters practicable. The tolls are charged in respect to the enjoyment of benefits conferred by the expenditures of defendant; and whether these benefits originate with the improvement, the defendant has made, or are only enhanced by it, is immaterial to the justice or legality of the impost.

It is further contended that defendant is the successor and assign of McLeod in respect to this dam, and is charged with all his duties; and that there was legislation under which McLeod built, which required him to construct a lock for the passage without charge of whatever navigated the river. The deduction is that defendant must maintain such a free passage now. But in the first place no such legislation appears to have been brought to notice in the court below, and in the second place it is not shown that defendant is the assign of McLeod. The supposition that McLeod may have abandoned his dam as useless is consistent with any thing that appears in the evidence; and in that case the appropriation of it by any one else who should find it a convenience in improving the river would have been perfectly proper, provided the authority of the appropriator from the State was such as would justify the erection as a new one. Certainly so long as defendant does not claim under McLeod, or need any grant McLeod may have had, to justify damming the river, his obligations cannot be said presumptively to have been assumed by it.

But it is said that defendant must claim under McLeod, who built his dam before the present Constitution was adopted, because since that time no dam can be constructed across a navigable stream except with the consent of the board of supervisors of the county, which defendant has never obtained. The conclusive reply to this suggestion is that no question of consent of the board of supervisors appears to have been made in the court below, and we neither know what the fact was, nor could we act upon it if we did. We sit here to review only the rulings of the Circuit judge.

The Circuit judge gave instructions to the jury corresponding to the views above expressed, and verdict and judgment were rendered for defendant.

This judgment must be affirmed with cost.

Judgment affirmed.

The other justices concurred.

RICE v. TOWNSHIP OF SIDNEY.

(44 Mich. 37.)

Surety — evidence — settlement by principal.

The surety of a township treasurer is not bound by a settlement of the treasurer's accounts with the town by the treasurer's deputy without the treasurer's knowledge, the treasurer being charged by the town clerk in the account upon which the settlement was based, with moneys which his predecessor never paid over.*

SUIT on town treasurer's bond. The opinion states the case. The plaintiff had judgment below.

Lemuel Clute, for plaintiffs in error.

M. Clement Palmer and *Ellsworth & Sapp*, for defendant in error.

CAMPBELL, J. Plaintiffs in error were sued on the official bond of Epley as town treasurer of defendant in error for moneys due from him to the township at the close of his official term in 1875. The finding of the court is that at the end of that year he was found to have a balance in his hands of \$1,215.80, which he did not pay over to his successor, Joseph E. Morrison, but a portion was afterward paid to M. A. Reynolds, Morrison's successor. The case was tried without a jury, and judgment was rendered for the balance.

The only points argued before us were that neither testimony nor finding can warrant the judgment.

We do not see any defect in the finding. It is express to the effect that the balance was in Epley's hands and not paid over. But it is claimed there were other facts found which preclude such an inference. The only other fact so relied on is that in the account kept against Morrison by the town clerk, Morrison was charged with the amount as money in the treasury, and that Rice, who was Morrison's deputy, if there is any propriety in using such a name, settled Morrison's accounts with the town at the close of his term on that basis. But it appears Morrison had no knowledge of these

* See *Boone County v. Jones* (54 Iowa, 699), 37 Am. Rep. 229, and note, 234.

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charges personally, or to speak more precisely, that he was not present at the settlement, and is not shown to have had any knowledge that the clerk had so charged him.

The money in the hands of Epley at the close of his term was not money in the treasury in the sense that the township had it in its own custody, but was merely so much due to the township from Epley, which he was bound to pay over to his successor. Unless so paid over Epley and his bondsmen were liable.

If Morrison himself had given credit to Epley for this money, it might raise a presumption, perhaps, that it was paid over. But an entry by the town clerk, carrying over an apparent balance from one treasurer to another, could not be evidence of the receipt of the money by Morrison. Neither could the settlement with Rice, of which Morrison was ignorant, be regarded as any such evidence. And we think it cannot be maintained that a false statement made by Morrison himself could prevent the township from recovering moneys belonging to the corporation from a previous defaulter. Nothing but an intentional acceptance of Morrison's responsibility in lieu of Epley's could discharge Epley. We are not prepared without further light to say that anything but payment would discharge him. Morrison's sureties could not be bound by a false settlement.

Some evidence was necessary to show the payment of the money to Morrison. The testimony introduced could in no sense be regarded as even amounting to an admission by Morrison that he had received the money. We think therefore the judgment was right, and it must be affirmed with costs.

Judgment affirmed.

The other justices concurred.

ÆTNA INSURANCE COMPANY v. RESH.

(44 Mich. 55.)

Insurance—fire—severability of contract.

Where a house and personal property in it are insured in the same policy, and the insurance is voidable as to the realty by reason of false representations of the applicant as to title, it will not be held valid as to the personalty unless it clearly appears that the insurer would have taken both risks separately. (*See note, p. 230.*)

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ACTION on policy of fire insurance. The opinion shows the point. The plaintiff had judgment below.

Norris & Uhl, for plaintiffs in error.

Simonds & Fletcher, for defendants in error.

MARSTON, C. J. This case now comes before the court upon the same showing as when here before, with the addition that evidence was introduced tending to show the rate per cent at which the property was insured, and the ruling of the court that under such evidence the policy was divisible, and that a recovery might be had for the personal property lost. The prior decision will be found in 40 Mich. 241. As was said when the case was here before, reference was made in the policy to a written application which was declared to be a warranty, and the policy was to be avoided for any omission to make known a material fact. The false representations related to the title of the insured to the real estate and incumbrances thereon.

There is a conflict in authorities as to the right to recover in cases like the present. That there may be cases where the contract would be divisible, and where the fact that the policy might be rendered void as to a part would not affect the whole, we do not question, and what may here be said must not be understood as going beyond the facts of this case as presented us.

Here the false statements which avoided the policy as to the buildings were made before the policy was issued. The personal property was in the same building. If it was for the interest of the insured to cause or suffer a loss of the building, because he had not the interest therein he had represented, it would we think be idle to say that such fact would not increase the risk upon the personal property in such building. It would be very unsafe therefore to assume that the company would have taken a risk upon the personal property, separate from the building, and therefore, because the rate and the amount insured upon the personal can be separated from that on the building, to hold that the contract is divisible. That the company would have taken a risk upon the personal property alone, to a like amount and at the same rate, we may assume, even with full knowledge that the insured had no title to the building; but it would be hazardous to assume that with such knowledge the company would have written upon both the personal

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property and the building, so that upon the whole policy the insured would be more interested in a loss of both than in their protection. It was declared in this policy that the omission to make known a material fact should render it void, and we cannot say that the false representation was not material as to both the real and personal property. The case should be clear and free from all reasonable doubt to warrant a court in carving out separate and distinct contracts from one common whole. The authorities upon this question are collected and cited in the briefs of counsel.

Upon the facts presented there can be no recovery, yet we can but reverse the judgment with costs and order a new trial.

Judgment reversed.

The other justices concurred.

NOTE BY THE REPORTER.—See *Moore v. Virginia F. & M. Ins. Co.*, 28 Gratt. 508; s. c., 38 Am. Rep. 373; *Plath v. Minnesota Farmers' Mut. F. Ins. Ass.*, 23 Minn. 479; s. c., 23 Am. Rep. 697; agreeing with the principal case; *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 62; s. c., 29 Am. Rep. 184, holding the contrary in case of mere breach of warranty as to one subject of the insurance; and *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507; s. c., 27 Am. Rep. 582, holding the contrary in case of sale of a portion of the property separately appraised and insured in the same policy.

In *Lovjoy v. Augusta Mut. F. Ins. Co.*, 45 Me. 472, there was separate insurance on a store and on goods therein, the premiums being entire. Held, that the false representation that the insured owned the store avoided the entire insurance. This was followed in *Gould v. York Co. Mut. F. Ins. Co.*, 47 Me. 403, a case of insurance of store and of goods in it, where the store was inadvertently but incorrectly represented as unincumbered. The court said: "A policy obtained by misrepresentation is, in legal intendment, no insurance at all." The same was held in *Barnes v. Union Mut. F. Ins. Co.*, 51 Me. 110, of insurance on a dwelling and the furniture in it, where the insurance as to the dwelling was avoided by a subsequent alienation. *Day v. Charter Oak F. & M. Ins. Co.*, 11. 91, is to the same effect.

In *Clark v. N. E. Mut. F. Ins. Co.*, 6 Cush. 342, it was held, that the alienation of one of several estates, separately insured by the same policy, in which it is provided that when any property insured shall be alienated the policy shall be void, only avoids the policy as to the estate so alienated. The court briefly say, "the alienation of the one would no more affect the insurance on the other, than if they had been insured in separate policies." But in *Friesmuth v. Agawam Mut. F. Ins. Co.*, 10 Cush. 587, it was held that a policy, insuring several specific kinds of property, with a separate valuation to each, being made for an entire consideration, and creating a lien on the whole property to secure the premium note, is wholly void if the property is represented to be unincumbered and partly under mortgage. The court said: "The contract of insurance on the part of the defendants was not distinct and separate on each class or subject embraced in the policy. It was separate and distinct so far only as to limit the extent of the risk assumed by the defendants on each kind of property. In other respects it was an entire contract. This is manifest from the fact that the premium and deposit are designated as entire sums without any reference to the different kinds of property covered by the policy on the separate sums insured on each. There is nothing in the application or policy from which it can be ascertained how much of the deposit note was made up of the rate of insurance charged on the real estate, and how much of that on the personal property. The consideration of the contract was regarded by the parties as an entirety of which they did not contemplate a separation or apportionment. It was in consideration of the entire sum for which the deposit note was given, and the liability of the assured to assessment on that amount in case of losses, that the defendants assumed all the risks contained in the policy. They had the right to look to their lien on each and all the different kinds of property insured by them

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for the security of the whole amount of the deposit notes. * * * This is not a case therefore of an insurance of different kinds or species of property to a specific amount with a separate premium and deposit charged and designated as belonging to each for which a distinct lien can be asserted; but it is an insurance for an entire consideration when the lien attaches to the whole property to secure the full amount of the deposit note." The same was held in *Brown v. Peoples' Mut. Ins. Co.*, 11 Cush. 280, where but one premium note was given. The *Clark* case was not referred to in the *Friessmith* case, and was referred to in the *Brown* case, *sub nom. Davenport*, only on the effect of misrepresentation. The same doctrine was followed in *Kimball v. Howard*, 8 Gray, 83, and *Lee v. Howard Ins. Co.*, 3 id. 568.

In *Fire Association v. Williamson*, 26 Penn. St. 196, three adjoining houses were insured in one policy for a specified amount on each, and gunpowder was stored in one of them, and caused a loss of all. Held, that the policy was avoided as to all. The court said: "Although three buildings were insured, the contract was an entirety." The same was held in *Gottaman v. Penn. Ins. Co.*, 86 id. 210, where a barn and personal property in another building were insured in the same policy, and there was a breach of warranty as to incumbrances on the building, and the personalty alone was burned. The court said: "It is not quite agreeable to our ideas of abstract justice, to be obliged to admit that an untrue answer in regard to incumbrances on the real estate, which was not in the least affected or deteriorated by the fire, should have the effect to deprive the insured of compensation for that about which there was no untruth, as the jury have found, and which was entirely destroyed. In the absence of this contract this would look unreasonable. But we must not forget the contract. * * * They have chosen to agree, that for any untrue representation * * * the insurance shall be void and of no effect. * * * The consideration is entire and indivisible. Citing the Massachusetts and Maine cases.

In *Brownman v. Franklin F. Ins. Co.*, 40 Md. 620, the court said: "The third and last question presented is, whether as part of the insurance was on the building, and part on the machinery therein, it was competent to the plaintiff to recover on the policy such amount as was apportioned to the machinery, notwithstanding the policy is void as to the building? In regard to this question, the difficulty in the plaintiff's way is, that the contract is entire. The consideration for it was entire; and in such case the contract is held to be entire, although its subjects may consist of several distinct and wholly independent items. Moreover, the stipulation in regard to the forfeiture applies to the policy as an entirety." To the same effect, *Associated Firemen's Ins. Co. v. Assum*, 5 id. 165.

In *Schumitsh v. Am. Ins. Co.*, 48 Wis. 26, it was held that where a policy covers personal property in a building, and other property is subsequently added to which the risk would attach under the general language used, and such addition is subsequently mortgaged without consent, in violation of the policy provision, a claim for damage to such mortgaged portion will work a forfeiture to the whole insurance.

The same holding was made in *Hinman v. Hartford F. Ins. Co.*, 36 Wis. 150, where a building and personal property in it were insured in one policy. The case does not show whether the subjects of insurance were separately valued in the policy.

The same doctrine in *Russ v. Mut. F. Ins. Co. of Clinton*, 29 U. C. (Q. B.) 73.

On the other hand: In *Hartford F. Ins. Co. v. Walsh*, 54 Ill. 164; s. c., 5 Am. Rep. 115, two houses were insured in one policy for different sums, and one became vacant. Held, that this did not invalidate the policy as to the other. The court only said, "we are at a loss to perceive how permitting the two-story house to become vacant without notice to and consent of the company, could invalidate the policy on the small frame building."

So in *Lochner v. Home Mut. Ins. Co.*, 17 Mo. 247; s. c., 19 id. 628, it was ruled that although a failure to disclose an incumbrance would avoid a policy as to a house insured, yet it would not avoid it as to furniture insured in the same policy, but separately appraised, unless the fact concealed was shown to be material to the risk, and it was shown that a knowledge of it would have to a refusal to insure; and this was held to be a question for the jury. The court said: "The proportion of the premium due for each may be easily ascertained." The same doctrine was held in *Koontz v. Hannibal Savings and Ins. Co.*, 42 Mo. 23, where "there was nothing to show that the representation as to incumbrance on the stable formed an inducement to the execution of the policy covering the personal property." Citing the *Clark* case, 6 Cush. 342; *Phoenix Ins. Co. v. Lawrence*, 4 Metc. (Ky.)

9; *French v. Chenango County Mut. Ins. Co.*, 7 Hill, 122; and citing the later Massachusetts and New York cases.

The same doctrine was held in *Phoenix Ins. Co. v. Lawrence*, 4 Metc. (Ky.) 9. The court observed: "We perceive no reason for excepting this case from the general rule by which a policy making separate insurance upon several subjects is treated as separate policies would be." Citing the *Clark* case, and the *Lochner* case, *supra*.

May (Ins., §§ 189, 277, 278), and *Wood* (Fire Ins., § 328, and note), seem to prefer the doctrine of the principal case.

In *Date v. Ins. Co.*, 14 Up. Can. 502, C. P., the policy insured in specific sums stock in a building, and a dwelling and the furniture therein, the first at a premium of twenty per cent, and the two last at five per cent. *Held*, that the policy must be regarded as divisible, and an incumbrance of the dwelling does not affect the right of recovery as to the rest.

SKINNER V. SHANNON.

(44 Mich. 86.)

Execution — exemption — partnership.

When execution is levied on goods of a partnership, every member of the firm is entitled to his individual exemption.*

TROVER. The opinion states the point. The defendant had judgment below.

J. B. Wilkins and Hugh McCurdy for plaintiffs in error.

H. H. Pulver and Lyon & Kilpatrick for defendants in error.

MARSTON, C. J. Where a levy is made upon a stock of goods of a copartnership, is the firm as such, or the several members thereof, entitled to claim any part thereof as being exempt under the law of this State?

This question has arisen in several of the States, and thus far there is a want of harmony in the answers given thereto. We must, therefore, in the light of those cases, look to the Constitution, statutes and decisions of this State, and unfettered by previous decisions, construe the statute in accordance with the letter and evident spirit thereof.

Our Constitution, in section 1 of art. XIV, provides that "The personal property of every resident or this State, to consist of such property only as shall be designated by law, shall be exempted to

* *Contra*: *Spiro v. Parton* (3 Lea, 75), 31 Am. Rep. 620; *White v. Heffner* (30 La. Ann. 1280), 31 Am. Rep. 238.

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the amount of not less than five hundred dollars, from sale on execution or other final process of any court, issued for the collection of any debt contracted after the adoption of this Constitution."

The eighth subdivision of our statute (2 Comp. L., § 6101), under which this claim comes, is as follows: "The tools, implements, materials, stock, apparatus, team, vehicle, horses, harness, or other things, to enable any person to carry on the profession, trade, occupation, or business in which he is wholly or principally engaged, not exceeding in value two hundred and fifty dollars."

The exemption laws of this State have ever received a most liberal construction in aid of the wise and humane policy so clearly set forth in our Constitution and laws. As was said in *Rosenthal v. Scott*, 41 Mich. 633, the laws securing exemptions are not to be frittered away by construction so as to destroy their value. It has been held, accordingly, that one whose principal business was that of blacksmith might manufacture a wagon during his leisure time and offer the same for sale, and that it would be exempt while in process of manufacture and while held for sale. *Stewart v. Welton*, 32 Mich. 56. So a farm homestead right cannot be put in jeopardy by the extension of village limits so as to bring such property within the village. *Barber v. Rorabeck*, 36 Mich. 401. So the execution debtor is entitled to the full statutory exemption. Personal property subject to a mortgage for more than its appraised value cannot be turned out to him. *Bayne v. Patterson*, 40 Mich. 658. A homestead can be claimed in lands held in joint tenancy, or as tenants in common (*Lozo v. Sutherland*, 38 Mich. 171), and in lands of which a party was in possession under a contract to purchase. *Orr v. Shraft*, 22 Mich. 261. So a house, exempt as such, might be removed to another parcel of land without danger of seizure while in transit. *Bunker v. Paquette*, 37 Mich. 79. And a boarding-house keeper is entitled to the same exemption of household furniture as any other person. *Vanderhorst v. Bacon*, 38 Mich. 669; s. c., 31 Am. Rep. 328.

That the several members of a copartnership come within the language of the statute and Constitution there should be no question, and that they by becoming members of a firm do not place themselves beyond the pale of the reason of the law, would seem clear. The same reason which exists for protecting an individual engaged in carrying on business would seem to apply with equal force to each and every member of a firm. The whole object of

the law is to prevent a person from being stripped of all means of carrying on his business, and in this respect no distinction can exist between those who are members of a firm and those who are not.

Indeed, it is not claimed that members of a firm are not equally within the words and protecting care of the Constitution and statute, but that the right is given them, because of the peculiar rights of copartners to the firm property, as between themselves and also their creditors.

If the property is exempt under the statute, parties dealing with them must take notice of that fact, and it is no hardship whatever to enforce the right when the occasion arises which demands it. The creditor, in selling goods to an individual, knows that a certain portion of his debtor's property is not and will not be subject to his demands. And so if he sells to a firm, and the firm or each member thereof is entitled to a statutory exemption, the creditor sells in view of the hazard. There may be cases where, as between the members (and the same perhaps would not apply as to creditors), where one or more of the firm had no interest in the goods, but only in the profits, and some question might arise as to the right of such copartners to claim any part of the property as exempt; but such is not this case, and we do not therefore pass upon that question. So other difficulties may arise. Very many of these supposed difficulties are imaginary only, but we need not anticipate them. In my opinion the execution debtors in this case were each entitled, under our Constitution and statute, to his exemption. *Russell v. Lennon*, 39 Wis. 570; s. c., 20 Am. Rep. 60; and see the reasoning also in *Stewart v. Brown*, 37 N. Y., 350. It is strongly urged that both may claim the same piece of property. If so, the officer may select for them where they cannot agree and therefore do not. Comp. L., § 6103.

The judgment must be reversed with costs and a new trial ordered.

Judgment reversed.

The other justices concurred.

SINCLAIR V. SLAWSON.

(44 Mich. 123.)

Deed — registration — mistake in — notice.

The register of deeds in recording a mortgage omitted the name of the mortgagee. The name however appeared in the entry book in which by law he was required to enter the date of the receipt of deeds, the names of the parties, and the township in which the lands are situated. *Held*, that the latter book afforded constructive notice to purchasers.*

BILL for foreclosure. The opinion states the facts. The defendant had judgment below.

Isaac H. Parrish, for complainant.

Ellsworth & Sapp, for defendants.

COOLEY, J. This is a bill to foreclose a mortgage. The defendants claim the premises as *bona fide* purchasers under the mortgagor. The only question of law which is raised by the record is whether the mortgage is defeated by the conveyances to these defendants by reason of an error in recording it. It appeared that the register of deeds was making use in his office of books made up of printed blanks, and that in attempting to fill one of these for the record of the mortgage in suit, he wholly omitted the name of the mortgagee. It is not pretended that in any other particular the record was incorrect. The defendants bought without making an examination of the record, and there is no claim that they had express notice of the mortgage. The question, then, is whether the defective record was of any avail to complainant as constructive notice of his mortgage.

Under a New York statute which provided that no mortgage should "defeat or prejudice the title of any *bona fide* purchaser unless the same shall have been duly registered," Chancellor KENT held that "the registry is notice of the contents of it, and no more, and that the purchaser is not to be charged with notice of the con-

* See *Gilchrist v. Gough* (68 Ind. 576), 80 Am. Rep. 950.

tents of the mortgage, any further than they may be contained in the registry. The purchaser is not bound to attend to the correctness of the registry. It is the business of the mortgagee, and if a mistake occurs to his prejudice, the consequences of it lie between him and the clerk, and not between him and the *bona fide* purchaser." The statute, he adds, intended the registry "as the correct and sufficient source of information ; and it would be a doctrine productive of immense mischief to oblige the purchaser to look, at his peril, to the contents of every mortgage, and to be bound by them, when different from the contents as declared in the registry. The registry might prove only a snare to the purchaser, and no person could be safe in his purchase, without hunting out and inspecting the original mortgage, a task of great toil and difficulty. I am satisfied that this was not the intention, as it certainly is not the sound policy, of the statute. *Frost v. Beekman*, 1 Johns. Ch. 288, 299. The mistake in the record in that case consisted in a misrecital of the amount secured. The case has been often followed. In *Sanger v. Craigie*, 10 Vt. 555, the error consisted in misdescribing the land. In *Jennings v. Wood*, 20 Ohio, 261, the name of the grantor in a deed was incorrectly given. In *Parret v. Shaubhut*, 5 Minn. 323, the mistake consisted in the omission of one of the subscribing witnesses, whereby the deed was made to appear insufficiently executed. In *Shepherd v. Burkhalter*, 13 Ga. 443, the name of the mortgagor was not appended to the mortgage as recorded. In *Sawyer v. Adams*, 8 Vt. 172, the deed was recorded in an unused book and not indexed. *Terrell v. Andrew County*, 44 Mo. 309, was another case of error in giving in the record the amount of the mortgage, and the following are cases in which the thing conveyed was misdescribed: *Chamberlain v. Bell*, 7 Cal. 292; *Miller v. Bradford*, 12 Iowa, 14; *Baldwin v. Marshal*, 2 Humph. 116; *Brydon v. Campbell*, 40 Md. 331; *Breed v. Conley*, 14 Iowa, 269; *Gwynn v. Turner*, 18 id. 1. This court has also held that a sheriff's notice of attachment was ineffectual where by mistake it failed to describe the land attached. *Barnard v. Campau*, 29 Mich. 162.

On the other hand it has been held in Illinois, under a statute which gave a deed effect as against subsequent *bona fide* purchasers from the time it was filed for record, that the grantee was not affected by errors in recording ; he having done all that the law required of him when he had filed his deed with the recorder.

Merrick v. Wallace, 19 Ill. 486 ; *Polk v. Cosgrove*, 4 Biss. 437 ; *Riggs v. Boylan*, id. 445. So in Alabama, under a statute which made a conveyance "operative as a record" from the time it was left for registration, it was decided that a mortgage was a valid lien for the whole amount though incorrectly recorded as for a smaller sum. *Mims v. Mims*, 35 Ala. 23. The following are cases which recognize the rule that filing a deed for record gives it effect as a record : *Dubose v. Young*, 10 Ala. 365 ; *Bank of Kentucky v. Haggin*, 1 A. K. Marsh. 306.

The different conclusions in these cases are the result in the main of differences in the statutes under which the records have been made or attempted, and perhaps if all the statutes had been alike, all the decisions would have been harmonious. The doctrine that he who claims the benefit of registry laws must bring himself within them, is universally admitted. It becomes important, then, to see what our own statutes are which bear upon this case ; for these after all, and not the decisions of other States, must control.

We have no statute which makes a record necessary to the validity of a conveyance as between the parties. *Godfroy v. Disbrow*, Wal. Ch. 260 ; *Brown v. McCormick*, 28 Mich. 215. The recording is only for the preservation of evidence, and for notice to subsequent purchasers and incumbrancers. Every register of deeds is required to keep an entry book of deeds and an entry book of mortgages, each page of which shall be divided into six columns with the following headings : Date of reception ; Grantors (or Mortgagors) ; Grantees (or Mortgagees) ; Township where the lands lie ; To whom delivered after being recorded ; Fees received. In the entry book of mortgages he shall enter all mortgages and other instruments intended as securities, and all assignments of any such mortgages or securities ; and he shall note in such books the day, hour and minute of the reception and the other particulars in the appropriate columns, in the order in which such instruments are respectively received ; and every such instrument shall be considered as recorded at the time so noted. Comp. L., §§ 4226, 4227. These instruments are afterwards to be recorded at full length in proper books procured for the purpose (Comp. L., § 4228), and a general index made of them all, with the names of the parties alphabetically arranged. Comp. L., § 4230.

This mortgage therefore was in the law considered as recorded, and for all the purposes of notice and protection was

recorded when it was left for record, and noted in the entry book. No one pretends there was any defect or mistake in that entry. The complainant proved his mortgage with the register's certificate of due record indorsed thereon, and the defendants in their endeavor to show that it was not recorded in fact, showed only the error in copying the mortgage at large in the book kept for that purpose, and did not question the record in the entry book. It must be assumed therefore that that record was correct, and that it showed the names of the parties, the date of record, and the township in which the land was situated. Usually in such offices considerable time must elapse between the entry and the actual copying of the instrument upon the record book, and during all that time the entry book will constitute the record, and will be the means whereby third parties will be notified of conveyances. The record in that book will not be complete in itself, because it will not contain a particular description of the land, but it will direct the inquirer to the deed on file, and the two together will give full information. The one supplies all deficiencies in the other.

This mortgage then was recorded for the purposes of notice when it was filed, and remained effectual as against subsequent purchasers and incumbrancers for a time at least. When, if ever, did it cease to be recorded? Was it when a more complete record was attempted? Did the failure to make the more complete record render nugatory the one already made?

No doubt the entry in the entry book loses its importance when the instrument entered is properly recorded, because from that time the completed record gives the fullest information, and it will be that to which the general index will refer persons who are searching the records. But it will remain a record nevertheless, and it may have its importance in some cases. Every man who finds a mortgage recorded is notified by the date of the record that there is a record of certain particulars respecting the mortgage in the entry book, which he can at once refer to; and if any of those particulars chance to be omitted in the record book of mortgages, he understands where he can obtain information concerning them.

Now there was no omission or mistake in this case in respect to the name of the mortgagor. Any one searching for mortgages by him would have been directed by the general index to the defective record of this mortgage, and he would have found that record just as readily as he would have found it if correct. In this the case

differs from one like *Jennings v. Wood*, 20 Ohio, 261, in which the name of the grantor was omitted in the record; for the means of tracing conveyances are lost when you do not find in the index, as grantor or mortgagor, the name of the party in whom the title appears to stand.

The defective record is of a mortgage which upon the face of it appears to be a mere nullity; for it is manifest that there can be no mortgage without a mortgagee. But the very nature of the defect in the instrument is one that would instantly challenge attention; for no one for any conceivable purpose could be supposed to have an interest in placing such an instrument upon record. If actually defective as the record would indicate, no one could claim a lien by virtue of it; and if made dishonestly by the mortgagor, it could charge nothing, cover nothing, and deceive nobody. The suggestion of mistake when the record is examined is inevitable and spontaneous.

It is not necessary however to discuss or raise any question of the implications that may be supposed to arise from such a record; and in this opinion we neither express nor intimate any opinion upon the question whether a purchaser would be bound to take notice of this record if it stood by itself, or would be put upon inquiry by it. This record does not stand alone. All persons are notified by the law that the entry record remains, and that it contains certain particulars, among which is the very one which is absent from the record where the mortgage is recorded at large.

It may be said that the entry-book record is temporary in purpose, being designed as a guide merely to the deeds remaining in the files, and being superseded by the complete record when made. But the admission of this does not fully meet the present case. If the register before the deed was recorded were to take and destroy it, the mortgage would not thereby be lost, but in the words of the statute would be still considered as recorded, and the entry would evidence the fact. If he made a pretense of recording it, without intending to do so in fact, but made a defective record purposely, the result must be the same. In each case the reason for the temporary record remains and is as forcible as ever. Indeed, the reason holds good in every case until a perfect record is made, which supersedes the entry record, because it embraces all the particulars there found and many others. It holds good therefore in this case.

We say nothing about and express no opinion upon any case that differs in its facts from this. Here the entry record has not been wholly superseded, and it still remains and purchasers must take notice of it. With the other record it shows a mortgage complete in all its parts; the one supplementing the other completely and giving to a purchaser information as full and definite as he could have if the original mortgage was spread out before him.

The decree appealed from must be reversed, and the cause remanded with directions to enter decree for complainant in the usual form. The complainant will recover costs of both courts.

Decree reversed and cause remanded.

The other justices concurred.

CARTER V. GLASS.

(44 Mich. 154.)

Action — fraud — breach of warranty.

One who has suffered in the purchase of goods by reason of a false warranty may sue in tort for the deceit and set forth the false warranty as the means of injury.

TRESPASS on the case for damages. The opinion states the case. The plaintiff had judgment below.

Howell & Carr, for plaintiff in error.

Harsen D. Smith, for defendant in error.

COOLEY, J. But one question is presented by this record, namely, whether the count in the plaintiff's declaration on which he was permitted to recover in the court below, was a count in tort or upon a warranty. The count is as follows :

" And for that whereas the said plaintiff heretofore to wit, on the 28th day of November, A. D. 1879, at the township of Porter, in the county of Cass and State of Michigan, at the special instance and request of the said defendant, bargained with the said defendant to exchange with the said defendant the certain horse of the

said defendant and for a certain horse of said plaintiff's of great value, to wit, of the value of one hundred and fifty dollars, the said defendant then and there warranting the said horse to be sound and all right every way, then and there falsely and fraudulently sold and exchanged the same horse with the said plaintiff for the said horse of the said defendant to be delivered to said plaintiff as aforesaid, and the said plaintiff confiding in the said warranty that said horse was sound and all right every way as aforesaid; afterward, to wit, on the day and year aforesaid, at the township of Porter, in the county of Cass and State of Michigan, delivered his said horse to the said defendant in exchange for the said horse of the said defendant. Whereas, in truth and in fact at the time of the making of the said false warranty as aforesaid, and of the said exchanges as aforesaid, the said horse of the said defendant was not sound and all right every way, but on the contrary thereof there was, and still is, unsound, and hath become, and is of no use or value to the said plaintiff, and also by means of the promises the said plaintiff hath lost and been defrauded of the use of his said horse, to wit, at the township of Porter, in the county of Cass and State of Michigan aforesaid, and so the said plaintiff saith that the said defendant on the said sale and exchange falsely and fraudulently deceived and defrauded the said plaintiff as aforesaid, at the township of Porter, in the county of Cass and State of Michigan aforesaid, and also the said plaintiff was then and there put to great expense and charges in and about feeding, keeping and taking care of the said horse. Wherefore the said plaintiff saith that he is injured, hath sustained damages to a large amount, to wit, to the amount of one hundred dollars, and therefore he brings suit," etc.

The court below treated this as a count in tort, and allowed the plaintiff to recover, as upon a rescission of the contract. The defendant insists that it is a count in assumpsit, and in affirmance of the contract.

It was decided in *Beebe v. Knapp*, 28 Mich. 53, that an action on the case may be maintained for false representations in the sale of property whereby the vendee was deceived and defrauded, even though the vendor was not aware of the falsity of the representations when he made them. But there is no doubt the representations in such a case may be treated as warranties, and assumpsit brought at the option of the vendee. *Hawkins v. Pemberton*, 51 N. Y. 198; s. c., 10 Am. Rep. 595; *Wheeler v. Reed*, 36 Ill. 81;

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McGregor v. Penn, 9 Yerg. 74; *Henshaw v. Robins*, 9 Metc. 83; *Burge v. Stroberg*, 42 Ga. 83; *Stone v. Covell*, 29 Mich. 359. As the declaration in either case must set out the facts, there must necessarily be considerable similarity, and this is not the first instance by many in which a count meant to be in case for the deceit has been mistaken for one in assumpsit. But the leading case of *Williamson v. Allison*, 2 East, 446, fully sustains the ruling of the court below. It was there said by Lord ELLENBOROUGH that "the warranty is the thing which deceives the buyer who relies on it and is thereby put off his guard. Then if the warranty be the material averment, it is sufficient to prove that broken to establish the deceit; and "the form of the action cannot vary the proof in that respect." The same case decides that it is not necessary either to aver or prove the *scienter*, and to render the case more completely like the present in principle, the declaration there as here failed to aver an offer to return the property in the sale of which the tort was committed. The doctrine of that case is familiar law in this country. *Beeman v. Buck*, 3 Vt. 53; *West v. Emery*, 17 id. 583; *Johnson v. McDaniel*, 15 Ark. 109; *Hillman v. Wilcox*, 30 Me. 170; *Newell v. Horn*, 45 N. H. 421; *Ives v. Carter*, 24 Conn. 392. An examination of *Ross v. Mather*, 51 N. Y. 108; s. c., 10 Am. Rep. 562, which questions the soundness of *Williamson v. Allison*, will show that the criticism was based on a misapprehension of the point decided.

All the errors relied upon in this case depend upon the one noticed. The judgment was right and must be affirmed with costs.

Judgment affirmed.

The other justices concurred.

MARQUETTE, HOUGHTON & ONTONAGON RAILROAD COMPANY v. SPEAR.

(44 Mich. 169.)

Negligence—contributory—sparks from a locomotive.

The plaintiffs owned a warehouse, with a branch track connecting with defendant's railway, and employed defendants to draw cars upon that track

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for their accommodation. The engine thus used emitted sparks; the plaintiffs complained of this to defendants; the defendants promised to repair it, but neglected to do so; and the plaintiffs continued to employ the engine. The warehouse being set on fire by sparks from this engine, *held*, that the plaintiffs had no remedy therefor against defendants.

ACTION of damages for negligence. The opinion states the facts. The plaintiffs had judgment below.

W. P. Healy, for plaintiff in error.

M. H. Maynard and *Dan H. Ball*, for defendants in error.

COOLEY, J. Defendants in error sued the railroad company in case for negligently setting fire to a quantity of hay and a warehouse, whereby they were destroyed. The facts as they were developed on the trial were that plaintiffs owned the warehouse and a quantity of hay stored near it on premises of their own, and that upon these premises they had caused to be laid a track upon which railroad engines and cars might be and had been running for their accommodation for a long time before the fire. When plaintiffs had occasion for cars, they had an arrangement with the railroad company to draw them in and take them out. A particular engine belonged to the railroad company, named Birchrod, was made use of for this purpose, and about the time of the fire it was going in and out several times a day. One of the plaintiffs testified that on the occasion of the fire she went in and out throwing sparks. "The engine went out with one train of cars throwing sparks, as she was accustomed to do all the time." He was sitting in the office watching her, and saw as she passed that a spark had communicated fire to the hay. There was quite a brisk breeze blowing at the time. The engine "was noted for throwing sparks, and had two or three times before set loose hay on fire on the dock. She had set fire, thrown fire around on the dock, and set loose hay on fire before on the dock that season — that spring. She was in the habit of throwing sparks in going up the hill when she puffed hard, and had a load behind her. She threw live cinders I suppose a quarter or a half an inch in diameter." The witness had called the attention of the train dispatcher of the railroad company to the dangerous condition of the engine that season and the season before, and he said he would see it fixed. Plaintiffs had always had trouble

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with it, and were afraid of it, because of its throwing sparks. The train dispatcher kept putting off the fixing; said "it would be fixed some time." Nevertheless plaintiffs continued to employ from day to day this dangerous implement, until such a calamity as they had feared actually occurred.

It seems almost unnecessary to do more than to recite this evidence in order to dispose of the case. Instead of showing a cause of action, it effectually disproves the existence of one. This was not the case of a defective locomotive moving through the country and scattering desolation among those to whom its proprietors owed the duty of a care corresponding to its dangerous nature; but it was a case of private employment, whereby the proprietors of the engine were solicited to send it upon the private business of the employers into a place where the latter well knew, and had for a long time known and understood it was likely to do mischief. If there was negligence on the part of the railroad company, it was to be found in consenting to be thus employed. There is just the same and no more reason for the plaintiffs to complain of it than there would have been had they hired the owner of a vicious animal, known by them to be such, to bring him for their purposes upon their premises, and then been injured by him as they should have anticipated they might be. That which one consents to, and invites, he cannot complain of in the law as an injury. *Molz v. Detroit*, 18 Mich. 495; *Maxwell v. Bridge Company*, 41 id. 453.

But it is argued that the company promised to repair the engine, and plaintiffs had a right to rely upon this being done. The promise was to repair it "some time;" and meantime the instrument was being employed by plaintiffs from day to day with knowledge that the repairs were not made. When there is a promise to repair immediately, or within a fixed time, and a party relies upon its having been done, and is injured because of such reliance, he has a right to complain; but this is no such case. The promise was wholly indefinite, and plaintiffs never relied upon it except as a probable future event. They knew the repairs had not been made when they employed the engine on the day of the fire, and they deliberately and most carelessly took the risks of what actually happened.

The judgment must be reversed with costs and the record remanded for a new trial.

Judgment reversed.

The other justices concurred.

CROWNER V. CROWNER.

(44 Mich. 180.)

Marriage — divorce — evidence — testimony of young children of parties.

A divorce will not be granted upon the testimony of young children of the parties. (See note at foot of page.)

DIVORCE. The opinion states the case. The plaintiff had judgment below.

J. O. Selden, for complainant.

Cook & Daboll, for defendant.

COOLEY, J. The bill in this case is filed for a divorce because of alleged adultery. The parties were married in 1866, and the adultery is alleged to have taken place in May, 1879. There is no direct evidence of the alleged offense, but circumstances of a suspicious nature are sworn to by two children of the parties, the eldest of whom was twelve years of age when sworn, and both of whom would seem, if their evidence is trusted, to have precocious understanding of the nature and criminality of the conduct charged. We had occasion in *Kneale v. Kneale*, 28 Mich. 344, to comment upon the manifest impropriety of calling children of such a tender age to testify against their mother to establish an offense against chastity. It is a great wrong to them, not only as it touches them in their natural affections, but also as it tends to destroy their purity of mind and conduct. Moreover, the evidence of such children to acts, which will naturally be construed by their prepossessions and immature and incorrect notions, is of very slight value, even when honestly called out and given, and is easily shaped and perverted if a dishonest father shall be so inclined. We shall not grant a divorce upon such evidence unsupported, and there is not much other evidence in this case.

The decree must be reversed and the bill dismissed.

Decree reversed.

The other justices concurred.

NOTE BY THE REPORTER.—In *Tobey v. Leonard*, 2 Wall. 422, a case involving an angry family quarrel, a father introduced as witnesses his minor children, one of them eleven years old, to testify as to what had been said in "the nursery" (as the reporter puts it).

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The court remarked that "when the father of a family introduces the juvenile members of it in such a litigation as this has been, it cannot be done without its being considered as a forlorn effort of parental obliquity."

In *Draper v. Draper*, 68 Ill. 17, a divorce case, a child nine years old was permitted to testify on behalf of the complainant, her mother. This was held no error, she having testified that she "understood the nature of an oath, and that if she did not swear the truth she would go into hell-fire."

See *McGuire v. People*, post.

 PEOPLE'S ICE COMPANY V. STEAMER EXCELSIOR.

(44 Mich. 220.)

Water and watercourse — right of riparian owner in ice — damages

The plaintiffs, engaged in the ice business at Detroit and lessees of a large portion of the water front of Belle Isle, in the Detroit river, constructed a boom along the same fifteen feet from the shore. The defendant's ferry boat was run up and down the river so near the boom that the swell broke up and destroyed the ice formed inside the boom in the winter, and the weather becoming and continuing warm, new ice did not form. There was room for the passage of the boat at a safe distance from the boom. *Held*, that the defendant's boat was liable for damage to the plaintiffs' business. (See note, p. 255.)

The measure of damages is the value of what could have been harvested less expense of storing.

THE opinion states the case. The plaintiff had judgment below.

George H. Lothrop and George V. N. Lothrop, for complainant.

Wisner & Speed, for respondent.

MARSTON, C. J. Some of the questions raised in this case are not only interesting, but of such importance as to demand great care in their examination and in the discussion and disposition thereof.

The following statement of the case is taken from the briefs of counsel for the respective parties: In January, 1878, the complainant was an ice company in Detroit doing a general ice business, and was lessee of a portion of Belle Isle in the Detroit river, consisting chiefly of water front. The respondent steamer was a ferry

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boat used and employed in ferrying between Windsor and Detroit. Occasionally she was used for towing upon the Detroit river and adjacent waters. On the leased property, running along inside of the channel bank of the Detroit river, the complainant had constructed a boom 3,600 feet long, containing 1,099,600 square feet, outside of a line fifteen feet from the shore.

On the shore adjacent to this pond, complainant had fifteen ice-houses, capable of holding about twenty thousand tons of ice. On January 11, 1878, this pond was frozen over with hard, clear ice, six inches thick. On that day the Detroit river was entirely open, and the steamer was taken by her master from her dock below Belle Isle up beyond, then turned and run down part way, thence up, then down and up again, then down to Detroit. Complainant claimed that the steamer was run on these trips unusually near the boom, and that the swell caused by the steamer broke up the ice in the boom so that complainant was unable to harvest it. The width of the channel of the Detroit river opposite this boom was upward of eighteen hundred feet. This was the first crop of ice that had formed that winter, and the weather thereafter was so mild that no more ice fit to cut formed in the boom; consequently complainant failed to get a stock to fill its ice houses.

The case was heard in the court below without a jury, and judgment was rendered in favor of complaint for one thousand dollars damages. Both parties appealed.

The complainant appealed because the amount awarded was considered inadequate. The defendant presents several objections in this court: that the amount of the decree is larger than the evidence warranted; that the mildness of the winter of 1877-8 was the proximate cause of any injury suffered by complainant, and that the respondent is not liable for such an injury; that the court should have adopted as the correct rule of damages "the true value of the ice, or rather the privilege of taking it—what it would have been shown to be, had the matter been settled or the case tried on the very day the ice was broken"; that conceding the respondent to be liable, which was not done, the value is to be determined as on the day ice was broken, and upon the probabilities, based upon the ordinary course of events, relating to such matters. It being alleged that the steamer did not keep in the channel of the river and away from the boom—which if she had done no damage would have been done the ice—the respondent,

in answer thereto, claims that the right to navigate any portion of Detroit river, between its banks, is not subject to the rights of parties having property along the shore that may be injured by the swell occasioned by passing steamers, and that no such burthen can be attached to the right of navigation. The respondent further claims that if the only object the master had in going up the river was to break the ice, he in so doing was acting entirely beyond the scope of his employment, for which neither the vessels nor the owner would be liable. It was also claimed that the steamer, having been bonded and released under the statute, a decree against the vessel was unwarranted. This complainant's counsel conceded, so no farther notice thereof need be taken.

There was very great difference in the opinion of witnesses as to the value of the ice. Complainant's witnesses, in view of the season and subsequent scarcity of ice, valued it at two dollars per ton; some, indeed, still higher. The quantity was fixed at thirteen thousand tons. The defendant's witnesses, some of them, say that on January 11th, the time of the injury, the ice had no value, as it was not fit to cut; that six-inch ice could not profitably be cut, and that it was early in the season, when ice in its place might be expected to form. Others placed a value on the entire crop of from three to seven hundred dollars. That the ice was broken and destroyed for complainant's use by the swells caused by the steamer, we have no doubt; and owing to the width of the channel this could have been avoided without delay, danger or additional expense to the steamer. If we accept the evidence of the master as true, that his business in going up the river the first time was to ascertain the condition of the ice in Lake St. Clair in order to determine whether he could, with safety, on the next day go after and tow through a vessel; that in going up the second time he desired to ascertain whether the American channel was open, having omitted so to do on the first trip; and that the occasion of his third trip up was that he might cross over and enable a party on board, who was interested in the ice business, to see whether there was ice in a bay across the channel — it would not avail the defendant. It would still appear that the injury was done through gross carelessness, while the steamer was otherwise lawfully engaged.

Was then the respondent's right to navigate the Detroit river subject to complainant's right of property in this case? Ordinarily

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it may be said that the entire width of the highway may be used, yet the owner of the land over which it passes may, within the limits thereof, plant trees, set posts and do such other acts as will add to his convenience or assist in beautifying his premises. He is encouraged in doing this by public sentiment; in the remission of taxes by the public authorities, for the planting of trees; and in the protection which the law gives him by the punishment of those who interfere with or destroy what he has done. Public convenience may in time in particular locations require the removal of some of these things, and whenever the necessity arises and the public authorities request their removal, then the private must give way to the public or paramount right. But while permitted to remain, no one travelling the highway could willfully injure or destroy them, and should any one do so he would justly be held responsible notwithstanding his plea of a claim of right to travel over any part of the highway. If the law were otherwise, the streets in our cities and villages, and our public highways, would soon be stripped of their shade and ornament. *Clark v. Dasso*, 34 Mich. 86.

So in cities the right to use the public streets whereon to deposit materials for building purposes is frequently granted and enjoyed. Has the traveller the right unnecessarily to willfully or negligently drive over and break, mar or destroy such materials upon the plea of a right to use the highway? The law in this country requires the owners of vehicles, when meeting, each to bear to the right, yet it has never been supposed that a neglect so to do on the part of one would justify the other in willfully or carelessly injuring the person thus in the wrong. A teamster may temporarily incumber a part of the highway while loading or unloading; and while thus exercising his right, another cannot insist upon occupying the same place, or carelessly drive into and injure his team or vehicle. *Cary v. Daniels*, 8 Metc. 478; *Daniels v. Clegg*, 28 Mich. 32.

The right of fishing in our public navigable waters is one largely and profitably enjoyed, and in order to carry on the business successfully it frequently becomes necessary to set nets extending into the river channels and the deep navigable waters of our lakes. This may, and to a limited extent does, cause vessels to change their course in order that the property of the fishermen may not be injured or destroyed. The master of the vessel would not be justified if he should unnecessarily or wantonly run his vessel upon the nets and destroy them. *Post v. Munn*, 1 South. 61.

So in the rafting, running and towing of logs in our navigable waters, vessels are sometimes necessarily delayed or caused to change their course; yet in cases where the owners of the logs were exercising due care and reasonable diligence, the vessel must suffer the temporary delay or inconvenience caused. So in establishing dock lines and boom limits on our rivers and lakes, the channel is frequently encroached upon in order to reach deep water, that the right may be useful and valuable; and although the channel may thereby be narrowed, yet if ample room for the purposes of navigation remains, the owners of vessels cannot complain. Of course the right of navigation is paramount and no unreasonable or unnecessary obstruction can be permitted to interfere therewith; but while this is so, yet the riparian proprietor and the public do not thereby lose all right to use the stream for any other and legitimate purpose which will not unreasonably interfere with the right of navigation. The right of navigation, while paramount, is not exclusive, and cannot be exercised to the unnecessary or wanton destruction of private rights or property, where both can be freely and fairly enjoyed.

But in this case the vessel did not run into the boom, and therefore it may be said the case is not parallel with those we have been considering. The principle however is the same, which recognizes the superior right of the vessel, but punishes any abuse of that right. It is also clearly apparent that vessels have not an exclusive right to use the entire channel, which may be narrowed or used for purposes, some of which are but remotely, if at all, connected with the subject of navigation. It is well known, as this case proves, that there is a class of vessels navigating our lakes and rivers which cause, when running, very great commotion or swells in the water. It is also well known that on many of the rivers a class of lighters and barges are used for the lighterage or necessary transportation of the agricultural, manufacturing and mining products of the country. This class of vessels are often loaded to the water's edge, and in smooth waters are thus considered perfectly safe, and yet they could not venture out where the winds or waves could reach them. Would a steamer approaching such a tow, where it was clearly apparent the swell she created would endanger the lighter or cargo, be justified in recklessly pursuing her course at full speed, in case damage resulted? Upon some of our rivers and water highways artificial banks have been formed for the benefit of

commerce, and to prevent a spread of the waters over the adjoining country. The swells caused by steamers of a certain class would, by washing such banks and otherwise weaken and injure them, and thus create danger of public and private damage. Such dangers are frequently guarded against by legislation or rules of the highway, but it may be questionable whether such regulations are not merely declaratory of the common-law maxim that a man must enjoy his own property in such a manner as not to injure that of another person. So the right to boom logs is necessary to their profitable manufacture. The owners must therefore be protected in this right, else it would be of but little value. Vessels would have no right to destroy them, or wantonly run so close to them as to cause a loss of the property therein. A vessel has no right to wantonly run so close to the shore, to a boom or to a dock as to cause damage which could easily be avoided by standing farther off.

In the case at bar the complainant had a right under its lease to enjoy the ice in its boom, and to store it for use and profit. *Lorman v. Benson*, 8 Mich. 18. The owners of the defendant boat had a right to navigate the Detroit river, but in doing this they were morally and legally bound to do no wanton injury to the property of others. It was clear to all that the agitation of the water caused by the boat was breaking and destroying the ice, and it was well known to those in charge that there was abundant room for the vessel to proceed on her course without deviation or delay, and at such a distance from complainant's boom that no injury whatever would have been done. For such an injury we are of opinion the vessel should be held liable.

"Though a man do a lawful thing, yet if any damage thereby befalls another, he shall be answerable if he could have avoided it." The maxim *Sic utere, etc.*—"So use your own property as not to injure the rights of another,"—is of very general application in cases of conflicting interests, and it has been observed, will "generally serve as a clue to the labyrinth in such cases." Broom's *Legal Maxims*, 357, *et seq.*

As to the measure of damages. Defendant's position, if correct, must be of general application. Let us test it. Suppose a person goes upon the lands of his neighbor and willfully destroys his growing crops while immature, what should be the measure of damages?—the value of the crop in its then condition? If so, what

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would be the value of a crop of potatoes when the tubers were just forming? Of a crop of apples where the tree was destroyed while in full blossom? Of a crop of corn when commencing to tassel, or of wheat where the heads were forming? In the two first there would be no value whatever, and in the second for fodder only. Would the value in each case at the time of the injury be the measure of damages, or would the injured party be permitted to show what the matured crop, in all probability, would have been, for the purpose of recovering the damages he had sustained? If the value at the time of the injury only could be recovered, a way would thus be pointed out for parties to be avenged of their adversaries with impunity.

In the opinion of some of the witnesses six-inch ice was of but little if any value, owing to the difficulty of cutting and storing ice of that thickness; and some were of opinion that ice less than six inches had no present market value. If so, and the then value would be the measure of damages, then an ice company could with safety destroy the ice of its rivals, if only done at a time when the ice was not of sufficient thickness to cut and store. A daily breaking up of the ice would accomplish the desired result without danger of excessive damages or of any considerable liability. Such a rule would simply be one of gross injustice, and it is only necessary to thus carry out the position taken by counsel to show the injustice thereof.

The owner of the growing crops would not be limited in his recovery to the value thereof at the time of their destruction, nor to the fair rental value of the lands. If the action were brought at once and a trial had, the prospective yield and value of the crop when matured might be shown. The proof might be unsatisfactory and uncertain, and largely a matter of opinion. Such considerations should not however absolve the wrong-doer, and the dangers, if any, from such a rule, he should incur. If such an action were not commenced or tried until after the time when such crops would have matured, the same elements of uncertainty would not exist. It would then be known whether the season had been a favorable or an unfavorable one; the yield per acre in that vicinity; the market price of the crop; the expense—all could be ascertained with tolerable certainty, and why should the law exclude such proofs? The law affords abundant instances of cases analogous to the present, where the extent of the injury cannot be ascertained

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immediately thereafter, and where evidence is permitted to be given to show the probable extent thereof, or if sufficient time has intervened before the trial, to show the actual result. In all such cases the extent of the injury can be ascertained with reasonable certainty.

It is said however that this is permitting the damages to be enhanced by particular seasons and circumstances over which the wrong-doer had no control, to which he in no way contributed and could not have anticipated. What the anticipations of the wrong-doer may be, is important only when exemplary damages are demanded; the law measures the damages in other cases regardless of intentions. But why should not exceptionally favorable or unfavorable seasons be considered in this class of torts? In the ordinary case of the breach of contract the contractor may show that the season turned out a favorable one, and the effect thereof upon the profits he would have made. *Burrell v. New York, etc., Salt Co.*, 14 Mich. 33. So where there has been a breach of a contract, and the party not in fault has had to proceed and employ others, in an action to recover the damages sustained he may show an advance in the price of materials and labor after the breach. So if a person should let his farm to another on shares, or his mill for the season for a portion of the profits, why should he not be permitted to prove, in view of the season, what his probable share of the crops would have been, or his proportion of the profits of the mill, had the contract been fully performed? Why should not the favorable or unfavorable season enter into the question? All look to the favorable times and seasons to make their profits, and to recover back the losses they sustained during the unfavorable ones, and it is not for the wrong-doer to say they shall not.

It is undoubtedly true that there are exceptions and limitations to be considered. Thus, for the breach of a contract, extraordinary or un contemplated contingencies are considered as too remote to affect the damages. *Clark v. Moore*, 3 Mich. 55; *Michigan Cent. R. R. Co. v. Burrows*, 33 id. 6. Even in the case of a wrong-doer he may take or destroy personal property of a certain kind, such as live stock, which gave promise of, and in time might have been, of great value, but which, because of its immaturity, was of but little value comparatively. The future would be altogether too uncertain and dependent upon too many contingencies to base any estimate or make any calculation thereon. The expense

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attending its growth, the risk of accidents or death, and the utter uncertainty of its development and value consequent thereon, necessitate an adherence to its value at the time of the wrong done. Even in such a case there are surrounding circumstances in the past history and present promise of the property which may be taken into account and fix the value far above what it otherwise would be.

It is somewhat difficult to say in which class this case belongs, or to lay down any distinct rule that should govern in all such cases. There are uncertainties surrounding a case like the present which should not be overlooked. Would all the ice in this boom, estimated at 13,000 tons, have been gathered and safely stored had not the injury been done? The question is not what could possibly have been done had the ice not been broken, and had complainant, on the morning of that day, known that it must save that ice or obtain none that season. Such knowledge would undoubtedly have caused an extra effort to be made, and perhaps saved all of it; but in the absence thereof, and in view of the weather that might at such a season reasonably have been anticipated, would complainants have made such effort? They say they would — this of course in view of what afterward took place — but of this we are not certain. There is not the same reasonable certainty in this case that the crop would be harvested that exists in reference to other crops. The condition of the weather would more easily affect a crop of ice. Would the complainants, in hopes of more favorable weather and better ice, have waited and thus lost the whole or the greater part thereof? These are proper questions to be considered; and although, in the light of what followed, complainants say they intended to and would have put on an extra force, and thus have saved it, yet it is not clear to our minds that they would have done so.

These are risks attending the business and which the complainants must have run even had the ice been uninjured by the boat, and for such risks the defendants should not be held responsible. In other words, while the short crop and scarcity of ice the ensuing season, and value consequent thereon, should be considered in placing a value upon the ice destroyed, yet this can only be done upon the basis that complainants would have saved that ice, and for so much of it as they would in all probability have saved they should recover the full value, less the cost and expense of harvesting

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it. The defendants, while justly responsible to this extent, yet should not be held as insurers of its safe storage, as this was a risk the complainant, in any event, must have run. There is evidence in the case that ice under somewhat similar conditions about that time, owing to the unfavorable weather, was almost wholly lost.

In view therefore of all the circumstances of this case, of the preparations made by the plaintiff before the injury to harvest this ice, the weather thereafter and the uncertainty of gathering and storing it, of the season following and the price of ice, we are of opinion that the complainant should recover \$2,500 damages and costs.

Judgment accordingly.

The other justices concurred.

NOTE BY THE REPORTER. — In *Rowell v. Doyle*, Massachusetts Supreme Court, October, 1881, the plaintiffs were milk dealers, who supplied the Boston market, and used large quantities of ice, which they cut on Chauncey pond, "a great pond" (of about 180 acres) and store on the edge of the pond. In February, 1880, they had cleared the snow from a large area of the ice on the pond, preparatory to cutting the ice, when the defendant cut several holes through the ice, about a foot each in diameter, for the purpose of fishing. Hence the suit. The court, Gray, C. J., observed: "The right of fishing, as well as the right of taking ice, in a great pond, is a public right, which every inhabitant who can obtain access to the pond without trespass may exercise, so long as he does not interfere with the reasonable exercise, by others, of these and like rights in the pond, and complies with any rules established by the legislature or under its authority. *West Roxbury v. Stoddard*, 7 Allen, 158. The defendant, an inhabitant of the town, came upon the pond from the highway and fished at a time allowed by the regulations made by the town under the power conferred upon it by the legislature. *Commonwealth v. Vincent*, 108 Mass. 441. And the case stated does not find, nor contain any facts tending to show, that he was fishing in an unreasonable manner, or without due regard to the lawful rights of others. The plaintiffs had no peculiar title or right in the pond by virtue of being lessees of an ice-house and land upon the shore. *Hittinger v. Eames*, 121 Mass. 539. They had the same right as others to cut and take ice which was the natural product of the pond; but they had no right, to the exclusion of other public uses, to the occupation of any part of the pond for the purpose by artificial means of increasing the thickness of the ice." In *Marsh v. Colby*, 39 Mich. 629; s. c. 33 Am. Rep. 429, it was held that no action would lie for taking fish from a small lake nearly surrounded by the plaintiff's land. The Massachusetts court held in *Gage v. Steinkrans*, April, 1881, that the right to cut ice on a great pond is common to all, and the adjoining owners have no peculiar rights therein.

Two interesting recent cases involving similar questions, and disagreeing between themselves, may be given here. In *Washington Ice Co. v. Shortall*, 101 Ill., it was held that as to a stream above the tide the riparian proprietor has title to the center subject to the public right to navigate if the stream is navigable, and the ice formed on the stream along his lands is his exclusive property. Also, that in an action in trespass for taking ice in a stream over the land of another, to which the owner of the land has the exclusive right, the measure of damages is the value of the ice as soon as it is made a chattel, — that is, when scraped, plowed, sawed, cut and severed, ready for removal. The rule is analogous to cases where coal is wrongfully taken from the soil of another. The court said: "The court, at plaintiff's request, instructed the jury that the plaintiff was the owner of the whole bed of the river flowing through his premises; that when the water became congealed, the ice attaching to the soil constituted a part thereof, and belonged to the owner of the bed of the stream, and that he could maintain trespass for the wrongful entry and taking the ice; and that the measure of damages, in case of a finding for plaintiff, would

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be the value of the ice as soon as it existed as a chattel, — that is, as soon as it had been scraped, plowed, sawed, cut and severed, and ready for removal. Defendant excepted to the giving of such instruction, and asked the court to instruct the jury that a riparian owner on the banks of a river, navigable in fact, has no property in the ice formed in the midst of the stream, where he has done nothing to pond or separate it; but that any person might, as against such riparian owner, where he could gain access without passing over the shore or banks of the owner, enter upon the ice and remove the same, without cause of action or damage to such riparian owner, and that if such access as above stated had been gained, then at most plaintiff could recover but nominal damages, even if the action of trespass be sustained, — which was refused, and defendant excepted. The giving and refusing of instructions is assigned as error.

"It may be well to inquire, first, whether plaintiff, as riparian proprietor on both sides of the Calumet river, is the owner of the bed of the stream within the limits of his land. By the common law, only arms of the sea, and streams where the tide ebbs and flows, are regarded navigable. The stream above the tide, although it may be navigable in fact, belongs to the riparian proprietors on each side of it to its center, and the only right the public has therein is an easement for the purpose of navigation. Chancellor KENT, in his Commentaries, declares it as settled that grants of land bounded on rivers or upon their margins, above tide water, carry the exclusive right and title of the grantee to the center of the stream, subject to the easement of navigation, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river. If the same person be the owner on both sides of the river, he owns the whole river to the extent of the length of his lands upon it. 3 Com. 487, 428, marg. And this title to the middle of the stream includes the water, the bed, and all islands. 2 Hill, on Real Prop. 98; Ang. on Water Courses, §4.

"This rule of the common law has been adopted in this State, and is here the settled doctrine. It was so held in *Middleton v. Pratt*, 3 Scam. 510; *Houck v. Yates*, 2 Ill. 179, with regard to the Mississippi river where it bounds this State; in *Brason v. Brasher*, 64 id. 438, as to Rock river; *City of Chicago v. Laflin*, 49 id. 172, and *City of Chicago v. McGinn*, 51 id. 200, in regard to the Chicago river.

"The Calumet river then being non-tidal, and plaintiff owning lands on both sides of it, he is the owner of the whole of the bed of the stream to the extent of the length of his lands upon it.

"The next question respects the ownership of ice formed over the bed of the river passing through the land. It is objected by defendant that water in a running stream is not the property of any man, — that no proprietor has a property in the water itself, but a simple usufruct while it passes along; but manifestly different considerations apply to water in a running stream when in a liquid state and when frozen.

"In *Agawam Canal Co. v. Edwards*, 36 Conn. 497, it is said: 'The principle contained in the maxim, *cujus est solum ejus est usque ad casum*,' gives to a riparian owner an interest in a stream which runs over his land. But it is not a title to the water — it is a usufruct merely — a right to use it while passing over the land. The same right pertains to the land of every other riparian proprietor on the same stream and its tributaries, and as such has a similar and equal usufructuary right, the common interest requires that the right should be exercised and enjoyed by each in such a reasonable manner as not to injure unnecessarily the right of any other owner, above or below.'

"In *Elliott v. Fitchburg R. Co.*, 10 Cush. 191, SHAW, C. J., says: 'The right to flowing water is now well settled to be right incident to property in the land, — it is a right *publici juris*, of such character that whilst it is common and equal to all through whose land it runs, and no one can obstruct or divert it, yet as one of the beneficial gifts of providence each proprietor has a right to a just and reasonable use of it as it passes through his land; and so long as it is not wholly obstructed or diverted, or no larger appropriation of the water running through it is made than a just and reasonable use, it cannot be said to be wrongful or injurious to a proprietor lower down. * * * Still the rule is the same that each proprietor has a right to the reasonable use of it for his own benefit, for domestic use, and for manufacturing and agricultural purposes.'

"In *Rez v. Wharton*, 12 Mod. 510, HOLY, C. J., says: 'If a river run contiguously between the land of two persons, each of them is, of common right, owner of that part of the river which is next his land.'

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"Hilliard states that a water-course is regarded in law as a part of the land over which it flows. *Hill. Real Prop.* 100.

"It will thus be seen that the riparian owner, as such, has rights with respect to water in a running stream, — he has a right of use, which right authorizes the actual taking of a reasonable quantity of the water for his purposes. The limitation in extent of the use of the water is, that it shall not interfere with the public right of navigation, nor in a substantial degree diminish and impair the right of use of the water by a lower or upper proprietor as it passes along his land. The only opposing rights are such rights of the public, and such upper and lower proprietors. But when the water becomes congealed, and is in that state, these opposite rights are in nowise concerned. The ice may be used and appropriated without detriment to the right of navigation by the public, or to other riparian owners' right of use of the water of the stream when flowing over their land. The just and reasonable use of the water which belongs to the riparian proprietor would be, in such case of congealed state of the water, the unlimited use and appropriation of the ice by him, as it would be no interference with rights, of others. We are of opinion there is such latter right of use, and that it should be held property, of which the riparian owner cannot be deprived by a mere wrong-doer. When water has congealed and become attached to the soil, why should it not, like any other accession, be considered part of the realty? Wherein, in this regard, should the addition of ice formed over the bed of a stream be viewed differently from alluvion, which is the addition made to land by the washing of the sea or rivers? And we do not perceive why there is not as much reason to allow to the riparian owner the same right to take ice as to take fish, which latter is an exclusive right in such owner.

"In *McFurlin v. Essex Co.*, 10 Cush. 309, *SHAW, C. J.*, remarked: 'It is now perfectly well established as the law of this Commonwealth, that in all waters not navigable in the common-law sense of the term, — that is, in all waters above the flow of the tide, — the right of fishery is in the owner of the soil upon which it is carried on, and in such rivers that the right of soil is in the owner of the land bounding upon it. If the same person owns the land on both sides, the property in the soil is wholly in him, subject to certain duties to the public; and if different persons own the land on opposite sides, each is proprietor of the soil under the water to the middle or thread of the river.'

"The riparian proprietor has the sole right, unless he has granted it, to fish with *nets* or *seines* in connection with his own land. *Ang. Water-Courses*, § 67.

"In *Adams v. Pease*, 2 Conn. 481, it was held that the owners of land adjoining the Connecticut river above the flowing and ebbing of the tide have an exclusive right of fishery opposite to their land, to the middle of the river; and that the public have an easement in the river as a highway, for passing and repassing with every kind of water craft. So too *sea-weed* thrown upon the shore belongs to the owner of the soil upon which it is cast, *Emans v. Turnbull*, 2 Johns. 313.

"The exclusive right in the owner to take the ice formed over his land is an analogous right to those other ones which are acknowledged to exist in the subjects which have been mentioned, and may with like propriety be recognized. It is connected with and in the nature of an accession to the land, being an increment arising from formation over it, and belonging to the land properly, as being included in it in its indefinite extent upward.

"Ice, from its general use, has come to be merchantable commodity of value, and the traffic in it a quite important business. It would not be in the interest of peace and good order, nor consist with legal policy, that such an article should be held a thing of common right, and be left the subject of general scramble, leading to acts of force and violence. In reference to the rule which we here adopt, of assigning to the owner of the bed of a stream property in the ice which forms over it, we may well use, as fitly applying, the language of *HOMER, J.*, in *Adams v. Pease*, *supra*, in speaking of the common-law rule as to the right of fishery, viz.: 'The doctrine of the common law, as I have stated it, promotes the grand ends of civil society, by pursuing that wise and orderly maxim of assigning to every thing capable of ownership a legal and determinate owner.'

"In accordance with the views we hold, it was held in *Stale v. Pottmeyer*, 33 Ind. 402; 3 C., 5 Am. Rep. 224, that when the water of a flowing stream running in its natural channel is congealed, the ice attached to the soil constitutes a part of the land, and belongs to the owner of the bed of the stream, and he has the right to prevent its removal. See

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further, relative to the subject, *Myer v. Whitaker*, 55 How. Pr. 376; *Lorman v. Benson*, 8 Mich. 18; *Mt. River Woolen Manuf. Co. v. Smith*, 34 Conn. 403; *Brown v. Bowen*, 30 N. Y. 519.

"Defendant claims that it committed no trespass in taking the ice because the ice in the midst of a stream, navigable in fact, is naturally an obstruction to navigation, and that any one has the right, having obtained access independent of the riparian owner, to enter upon the ice and remove it. We said in *Braxton v. Bresseler*, above: 'Where the river is navigable, the public have an easement or a right of passage upon it as a highway, but not the right to remove the rock, gravel or soil, except as necessary to the enjoyment of the easement.' The same is to be said as to the ice here. But it was not removed as necessary for the enjoyment of the public easement of navigation, — it was for the purpose only of the appropriation of it for defendants' gain.

"As to the instruction as to the measure of damages, we think the case is analogous to those where coal is taken from the soil, and that the instruction is sustained by former decisions of this court in those cases. *Illinois & St. Louis R. Co. v. Ogle*, 22 Ill. 23; *McLean County Coal Co. v. Lennon*, 31 id. 561; *Illinois & St. Louis R. Co. v. Ogle*, 22 id. 627; *McLean County Coal Co. v. Long*, 81 id. 359; *Robertson v. Jones*, 71 id. 405."

In *Wood v. Fowler*, Kansas Supreme Court, April, 1881, it was held, that a riparian owner owns only to the bank and not to the center of a navigable stream; and that a riparian owner along a navigable stream does not own the ice which is formed on the stream adjacent to his land: and without first taking possession of and securing it, may not maintain an injunction to restrain a stranger from cutting and removing it. The court said: "The stream having been meandered, the lines of the surveys are bounded by the bank, the patents from the United States passed title only to the bank. Splitlog, as riparian owner, owned only to the bank. The title to the bed of the stream is in the State. *Stevens v. Railroad Co.*, 34 N. J. 533; s. c., 3 Am. Rep. 269; *Pollard's Lessee v. Hagan*, 3 How. 212. It is true, a distinction was recognized in England, and that streams were considered navigable only in so far as they partook of the sea and to the extent that their waters were affected by the ebb and flow of the tide, and only so far was the title of the riparian owner limited to the bank; above such point, even although the stream was large enough to be used, and in fact was used, for purposes of navigation, the riparian owner owned the soil *ad medium flum aquæ*. So that really three distinct characters of streams were recognized: First, those smaller streams which could not be used for any purpose of navigation, in which the title to the soil was in the riparian owner, and along which the public had no rights of highway or otherwise; an intermediate class, in which the riparian owner owned to the middle of the channel, but along whose stream the public had all the rights of a highway; and third, that which was called technically the navigable streams, where the title to the bed of the stream was in the sovereign, and all rights were in the public. The same doctrine of riparian ownership to the center of the stream in all rivers unaffected by the ebb and flow of the tide is recognized in some States of the Union; but the better and more generally accepted rule in this country is to apply the term navigable to all streams which are in fact navigable, and in such case to limit the title of the riparian owner to the bank of the stream. Especially is this true in the States where the lands have been surveyed and patented under Federal law. See the following authorities: *Railroad Co. v. Schurmeir*, 7 Wall. 273; *McManus v. Carmichael*, 3 Iowa, 1; *Haight v. Keokuk*, 4 id. 199; *Tombilen v. Railroad Co.*, 32 id. 106; *Flannigan v. City of Philadelphia*, 42 Penn. St. 219; *Bridge Co. v. Kirke*, 48 id. 112; *People v. Tibbetts*, 19 N. Y. 523; *People v. Canal Apprs.*, 33 id. 461. These conclusions seem to compel an affirmation of the judgment of the District Court: for whatever might be the case where a riparian owner owns to the center of the channel, and whatever ownership and control he may have over the ice which forms upon the stream upon his premises, and as to the extent of his rights, see the following authorities: *State v. Pottmeyer*, 33 Ind. 402; s. c., 5 Am. Rep. 324; *Mill River Co. v. Smith*, 34 Conn. 462; *Marshall v. Peters*, 12 How. Pr. 218; *Meyer v. Whitaker*, 55 Mich. 376; *Higgins v. Kusterer*, 41 Mich. 318; s. c., 34 Am. Rep. 100; *People's Ice Co. v. Excelsior*, 44 Mich. 229; *Patne v. Wood*, 108 Mass. 173; *Gage v. Stumphaus*, Supreme Court, Massachusetts, reported in 24 Alb. L. J. 518. It would seem that where there is no ownership of the subjacent soil, a riparian proprietor has no title to the ice. The title to the soil being in the State, and the stream being a public highway, obviously the ownership of the ice

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would vest in the general public or in the State as the representative of that public. The riparian proprietor would have no more title to the ice than he would to the fish. It simply is this, that his land joins the land of the State. The fact that it so joins gives him no title to that land or to any thing formed or grown upon it, any more than it does to any thing formed or grown, or found upon the land of any individual neighbor. Undoubtedly, in view of the importance that ice is rapidly assuming as a merchantable commodity, it would be wise for the State to legislate in reference to the ice product of the navigable streams; but until such legislation is had, it would seem that the one who first appropriates and secures the ice which is formed is entitled to it, and on the same principle that he who catches a fish in one of those rivers owns it. *Hickey v. Hazard*, 3 Mo. App. 480."

In *DeLje v. Barry*, New York Supreme Court, January, 1832, it was held, that a mill owner, who has the right to erect a dam and flow the lands of another for mill purposes, only, does not own ice which forms in the water over the lands of such person, and the latter may take and remove such ice unless he thereby actually and perceptibly injures the mill owner. The court said: "The owner of land through which a stream of water runs has a right to a just and reasonable use of it. So long as the water is not wholly obstructed or diverted, or no longer appropriation is made than a just and reasonable use, the proprietor who is lower down cannot complain. If this were not so, then there could be no use by any one of a running stream from its source to its mouth. *Elliot v. Fitzhury R. R. Co.*, 10 Cush. 191. 'All that the law requires of the party by or over whose land a stream passes is that he should use the water in a reasonable manner, and so as not to destroy, or render it useless, or materially diminish, or affect the application of the water by the proprietors above or below.' 3 Kent Com. 433, 440; *Pollitt v. Long*, 58 Barb. 20; *Merritt v. Brinkerhoff*, 17 Johns. 306; *Brown v. Brown*, 30 N. Y. 519. In *Elliot v. Fitzhury R. R.*, the court say, that 'the complaint is * * * for obstructing a part of the water of the stream. This is a right which each proprietor has if exercised within a reasonable limit'."

"The right which the riparian owner thus has may be modified, when some lower proprietor has a right to dam the stream for mill purposes, but if modified, it is not lost. Unless by some express grant or restriction to the contrary, we see no reason why the owner whose land is flowed by some dam below may not still have the just and reasonable use of the water which he would have had of the stream before the dam was built. And any use would seem to be just and reasonable which does no actual and perceptible damage to the owner below."

It was in this view that in the case of *Cummings v. Barrett*, 10 Cush. 186, the court intimated that a mill owner at the outlet of a pond could not deprive any person of the right of cutting ice, without showing actual damages therefrom. And the case of *Mill River Manufacturing Company v. Smith*, 84 Conn. 462, which is cited by plaintiff to sustain his view, the argument of the court is based on the statement that water is sometimes scarce; that ice liquefies and becomes water; that it prevents deep freezing and consequent deprivation of water. For which reasons the court concluded that the riparian owner could not remove snow and ice from a mill pond at pleasure and as fast as they form. Thus that decision is placed on the ground that the act of removal did an actual and not merely a constructive injury. And the doctrine of that case, that such riparian owner cannot remove such snow and ice at pleasure and as they form, is entirely consistent with the view that he may remove the ice over his land, if such removal does no actual and perceptible injury to the owner of the mill dam.

"In the case of the *State v. Pittmeyer*, 83 Ind. 402; s. c., 5 Am. Rep. 224, it was decided 'that when the water of a flowing stream is congealed and forms ice, that ice attached to the soil belongs to the owner of the bed of the stream. If this be so then the owner might remove it and dispose of it'. Such an act would only be that just and reasonable use of the water of the stream which he might have without doing wrong to the proprietor below him."

"If then we apply the rule which gives to the owner of land through which a stream flows that just or reasonable use which does not actually injure the proprietor below; if we apply this rule to the condition of things when ice has formed, we shall see that it follows that the riparian owner may take and remove the ice unless he thereby actually and perceptibly injures the proprietor below. And the same rule must apply when water

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has been set back by a dam. It is very plain that the ice which has formed will, in that state, be of no use in turning a mill wheel. Whether after a lapse of some month it will be of use as water, or whether it will pass over the dam in its solid state, are matters of uncertainty. Clearly without some proof of actual injury the plaintiff has no right to complain of the removal of the ice. This view was taken in the case of *Marshall v. Peters*, 12 How. Pr., 218 where it was held that the ice in a mill pond was not the absolute property of the owner of the mill.

"In the case of *Myers v. Whitaker*, 5 Abb. N. C., 172, the question was again examined; and the learned justice came to a conclusion contrary to that of Judge EMORR, in *Marshall v. Peters*, and contrary to that which we have above expressed. The ground of the argument is that the waters of a mill pond belong to the owner of the dam, 'subject only to the exception that the beneficial enjoyment of owners below should not be interfered with, just as much as if he had gathered them for his own use and benefit into a tank or cistern.' This is stated too strongly when the owner of the dam is not the owner of all the land flowed by means thereof."

"The riparian owners are not, we think, deprived of their rights as such owners by the construction of a dam below them. Their right to a just and reasonable use of the water remains if it has not been actually surrendered. If any riparian owner has land covered by the pond, we see no reason why he may not take the ice from that land, unless by so doing he causes an actual injury to the owner below by materially diminishing the use of the water to which such owner is entitled. It is plain to every one that the real trouble in such cases is not that the mill owner will be injured by the removal of the ice, but that he desires to remove it himself and make the profit of the sale. * * * There may perhaps be cases and times of the year in which the removal of ice would be unjust and unreasonable to the mill owner."

 EGBERT V. GREENWALT.

(44 Mich. 245.)

Criminal conversation — action lies although force is used — evidence.

An action lies for criminal conversation, although the intercourse was had by violence.

Husband and wife are incompetent to disprove sexual intercourse between themselves in order to raise a presumption against the legitimacy of the wife's child.

The presumption of legitimacy of a child born in wedlock can only be overcome by clear proof of non-intercourse.

TRESPASS on the case. The opinion states the case. The plaintiff had judgment below.

Edward Bacon, for plaintiff in error.

J. G' Turner, for defendant in error.

GRAVES, J. Greenwalt recovered for alleged criminal conversation with his wife. The suit was in the common form of an action

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on the case and was commenced in August, 1878. The trial took place in February, 1879. The whole testimony to prove the imputed intercourse and establish the cause of action was given by Greenwalt and his wife. The act was represented as one to which she was an involuntary party, and as having been accomplished against her will by actual force and over the stoutest resistance of which she was capable. It was referred to some day in December, 1877, earlier than the 27th.

Egbert testified for himself and positively denied having had intercourse with her at any time. It was claimed for Greenwalt that the injury inflicted by his wife's violation was aggravated by her being left pregnant; and the court overruled the defendant's objections and permitted her to testify that her husband, in consequence of having fever and ague, did not sleep with her for some time prior to defendant's connection with her, and had not slept with her since; that soon after the occurrence she discovered she was pregnant, and then informed her husband that the child was defendant's; that it was born the 23d of August, 1878. The plaintiff testified that he did not sleep with her for three months; that in the latter part of June, 1878, he noticed his wife's situation, and she then confessed to him. But he had continued since to live and cohabit with her.

The record contains a general exception to the court's refusal to consider the evidence sufficient to bar the action. It is too vague to deserve notice. But as counsel adverted to it a few words may not be amiss. The point of the objection is understood as being that the nature of the action excluded the idea of violence and contemplated that the wife's participation was voluntary and not forced, and that the case made by the evidence negatived her consent and proved that she was debauched by violence, the action failed.

The position is not tenable. The common law, in giving this remedy, instead of making the husband's right of action depend on his wife's having consented to her defilement, has invariably, whatever the truth might be, decisively assumed that she did not assent but was overcome by force, and the action has been sustained just the same, whether as matter of fact her will concurred or she was outraged by actual violence. *Bac. Ab. Marriage and Div.* 551-553; 3 *Bl. Com.* 139; 1 *Chitty Pl.* (7th Eng., 16th Am. ed.) 140, 141, 150, 151, 188; *Broom's Com.* 847, 848; 2 *Hill on Torts*, 507; *Forsythe v.*

State, 6 Ohio 23. And there seems to be no basis in justice or policy for the position that if the personal wrong is accompanied by circumstances of such atrocity as to elevate it to the public offense of rape, the private remedy is thereby either taken away or suspended. Cooley on Torts, 86 to 90. It is not reasonable to convert the wife's innocence into a shield to save her assailant from prosecution to his private wrong to her husband. Lord Holt seems to have recognized the principle that both remedies were admissible in a case of actual violence; and alluding to an attempt to carve out cause for a third proceeding to be carried on in the Bishop's Court, he said: "If a man solicit a woman, and goes gently to work with her first, and when he finds that will not do, he proceeds to force, it is all one continued act, beginning with innuendo and ending with force." *Rigaut v. Gallisard*, 7 Mod. 38.

In view of the rulings made on admitting evidence and in charging the jury it is unquestionable that the verdict must have been much influenced, if not determined, by the statements tendered on the part of the plaintiff and his wife and received by the court for the purpose of causing the jury to believe that they had no sexual intercourse at the time the child was begotten, and that the wrongful act of the defendant must have been the occasion of her condition, and this evidence in my opinion was not admissible. The parties were living amicably under the same roof and there was no serious obstacle to intercourse. There was such access as gave opportunity. That is not denied, and as matter of fact it was not asserted that intercourse did not take place.

It is not perceived that the wife's being admitted as a witness was objected to; and assuming, for this case, that she was entitled to be called, it does not follow that her personal knowledge of whatever in itself might be pertinent to the issue was rendered provable by her if objected to. The difference is wide between the competency of one to be a witness in a given case, and the right to use the witness to prove certain facts in his or her knowledge, however proper such facts may be in their own nature. There may be no ground whatever for excluding the person from the stand; but there may be sound reasons for refusing to permit him or her to swear to certain things or on certain subjects. The system of legal evidence has afforded always, and affords still, many illustrations. The statute offers an example where it excludes certain communications unless their disclosure is mutually assented to.

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According to an ancient rule of the common law the evidence of neither husband nor wife could be received to disprove the fact of sexual intercourse (*Rez v. Book*, 1 Wils. 340); and Lord MANSFIELD declared that it was "founded in decency, morality, and policy" (*Goodright v. Moss*, Cowper 591); and no judge or author has ever dissented from its strong approval. The reason of the rule has prescribed limits to its application, but there is no present occasion for special reference to any of the qualifications. That the legislature intended to abrogate it is not to be assumed. No one will contend that the course of the legislation of 1861 was unfriendly to it, nor can it be fairly argued that the terms or spirit of the amendments then made have supplanted it. The general purpose the legislature had in view was to sweep away a number of objections against the competency of witnesses, but not to break down any rule "founded in decency, morality, and policy," and so far as ascertained, the courts, wherever these general changes have taken place, have considered this rule of the common law as untouched. *Tioga County v. South Creek Township*, 75 Penn. St. 436; *Boykin v. Boykin*, 70 N. C. 262; s. c., 16 Am. Rep. 776; *Chamberlain v. People*, 23 N. Y. 88; *People v. Overseers of Ontario*, 15 Barb. 286; *Hemmenway v. Towner*, 1 Allen, 209; Stephens' Ev., art. 98. The effect of the statute upon the capability of the wife as a witness for the people in a prosecution against a person for having committed adultery with her, was fully discussed in *Parsons v. People*, 21 Mich. 509; but it was not found necessary to consider the present questions. I think the evidence of the plaintiff and his wife which was adduced to show non-intercourse between them, was not admissible. Whether some items might not have gone in for some other purpose need not be considered. They were offered and allowed to disprove sexual connection between the husband and wife, and establish as a necessary alternative that the defendant begot the child.

But let it be assumed that the evidence was lawfully before the court and jury, and then I think it was destitute of all force to prove non-intercourse, and that the court should have charged the jury to that effect. It was a maxim of the Roman law, and one which the common law copied, that the presumption is always in favor of legitimacy (Co. Litt. 126a) and that he is the father whom the marriage indicates (Co. Litt. 123; Domat, pt. 1 b. 3, t. 6, § 5; and Montesquieu, alluding to it, observed that "the wickedness of

unkind makes it necessary for the laws to suppose them better than they really are. Thus we judge that every child conceived in wedlock is legitimate, the law having a confidence in the mother as if she were chastity itself." Spirit of the Laws, B. 6, c. 17; and D'Aguesseau laid it down that "whilst the birth of children can be ascribed to a legitimate source, the law will not suppose criminality." Greenleaf says that where the husband and wife cohabit together as such, and no impotency is proved, the issue is conclusively presumed to be legitimate, though the wife is proved to have been at the same time guilty of infidelity. 1 Ev., § 28. The current of authority is in favor of qualifying this statement, and instead of regarding the presumption as conclusive, to require it to apply with great force but subject to be overcome by admissible facts and circumstances of such cogency as to render belief necessary. *Morris v. Davies*, 5 Cl. & Fin. 163; Wharton's Ev., §§ 1298, 1299, 1300; Best's Ev. (Wood's ed.) 426, 464, 465; Stephen's Ev., art. 98.

In the case of the *Banbury Peerage* the House of Lords dealt with the presumption and the degree of evidence necessary to overcome it, in this language: "In every case where a child is born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until that presumption is encountered by such evidence as proves, to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place at any time when, by such intercourse, the husband could, according to the laws of nature, be the father of such child." 1 Sim. & S. 155. And in *Bury v. Phillipot*, the Master of the Rolls, afterward Lord COTTENHAM, ruled that when opportunity existed for sexual intercourse within such period that the child in question might have been begotten by the husband, mere probabilities can have no weight against the legal inference. 2 Myl. & K. 349; and see *Kleinert v. Ehlers*, 38 Penn. St. 439; *Dennison v. Page* 29 id., 426; *Hargrave v. Hargrave*, 9 Beav. 552.

To overcome the presumption and disprove intercourse there must be cogent facts and circumstances. *Head v. Head*, 1 Sim. & S. 150; *Patterson v. Gaines*, 6 How. 550. In *Stegall v. Stegall*, Chief Justice MARSHALL held that whilst it was not necessary to make out that connection was not possible, it was proper that the evidence should establish its non-occurrence beyond all reasonable doubt (2

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Brock, 257); and the Supreme Court of Massachusetts applied the same rule in *Sullivan v. Kelly*, 3 Allen, 148. See also *Phillips v. Allen*, 3 Allen, 453; *Hemmenway v. Tower*, supra; *Cross v. Cross*, 3 Paige, 139.

Here, as already noticed, there was neither proof of inability nor of the certain want of opportunity, or even the faintest approach to a denial of the fact, and the child was born only eight months after the alleged violence. The circumstances permitted the assignment of the paternity of the child to the plaintiff without any infringements of the statements sworn to, and the court should have told the jury, as I think, that there was no legal evidence that the plaintiff was not father of the child, and that it was their duty to consider that he was. Some other matters have been referred to, but as the hearing has been *ex parte*, no one having appeared to support the judgment, it is deemed best to dispose of the case without going further.

The judgment must be reversed with costs and a new trial granted.

Judgment affirmed.

The other justices concurred.

MCGUIRE V. PEOPLE.

(44 Mich. 286.)

Witness—young child.

In a criminal prosecution a child six or seven years may be a competent witness, if the judge is satisfied of his intelligence and the jury are properly cautioned.*

CONVICTION of robbery. The opinion states the case.

McBride & Carroll and *E. S. Eggleston*, for plaintiff in error.

Attorney-General *Otto Kirchner*, for the people.

CAMPBELL, J. McGuire was convicted before the Superior Court of Grand Rapids of robbery, while armed with a dangerous weapon, committed on one Albertus Meyer. Meyer testified posi-

*See *Carter v. State* (68 Ala. 52), 35 Am. Rep. 4, and note, 7; *Crowner v. Crowner*, ante.

tively to the robbery on the night of November 17, 1879, while he was walking home with his little boy. He was approached from behind, gagged and thrown down, and his money stolen. He could not recognize the two men who robbed him before they ran out of sight, but the boy recognized McGuire and identified him. The most important evidence therefore was that of the child, who was a few months over six years old.

An exception was taken to the examination of this boy, on account of his extreme youth, and the judge who tried the cause had some hesitation about it. He however took the lad into his own room and had a long conference with him, in addition to what appeared in court, and he finally came to the conclusion that the child was sufficiently conscious of the duty of speaking the truth that he might be received as a witness, subject to such cautions to the jury as were proper concerning his statements.

We held in *Washburn v. People*, 10 Mich. 372, that the reception of such testimony was permissible where the judge was satisfied. We think that in the present case the course taken was such as to justify the judge in doing as he did. The boy was the only witness who could recognize the prisoner, and it was therefore important to receive him if there was any sound reason to believe he could give reliable information. There is of course some danger that a child of tender years may be influenced to tell what is not true. But the inability of such an inexperienced boy to keep up a consistent false story through the various questionings of a trial is a pretty safe guard against any great danger on that head. He is far more likely to answer wrongly from not fully understanding questions put to him, than from deliberate falsehood. His method of telling his story here was simple and childlike, and so far as we can tell from a paper description of it, was candid and honest. At any rate the jury must have thought so, and we are not surprised that they did. The judge cautioned the jury fully and clearly on the necessity of sifting his testimony very thoroughly. He could not well have been more explicit. We cannot think the danger of receiving such a witness is any greater than that of rejecting him.

[Omitting other matters.]

We discover no error, and the court below should be advised to proceed to sentence on the verdict.

Judgment accordingly.

The other justices concurred.

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(44 Mich. 299.)

Criminal law—false pretenses—"store keeper."

One who obtains credit on the false representation of being a "store keeper," may lawfully be convicted of false pretenses.

CONVICTION of false pretenses. The opinion states the case.

Miller and Clarke, for plaintiff in error.

Attorney-General *Otto Kirchner*, for people.

COOLEY, J. The plaintiff in error has been convicted in the Recorder's Court of Detroit upon an information charging him with obtaining twenty-five dollars of one Burley by false pretenses. The pretense alleged was "that he, the said John Higler, was then and there engaged in store-keeping in Cadillac, Wexford County, Michigan." No further representations are set set up as accompanying this false pretense, whereby it was made effective. The question now is whether the information will sustain the conviction.

The statute under which the information was filed is as follows :

"Every person who, with intent to defraud or cheat another, shall designedly, by color of any false token or writing, or by any other false pretense, cause any person to grant, convey, assign, demise, lease or mortgage any land * * or obtain the signature of any person to any written instrument, the making whereof would be punishable as forgery, or obtain from any person any money, personal property or valuable thing, or by means of any false weights or measures, obtain a larger amount or quantity of property than was bargained for, * * * shall be punished by imprisonment," etc. Public Acts, 1879, p. 197.

It is said that this statute enumerates certain kinds of false pretenses, and that according to a familiar rule of construction the "other" pretenses which the statute intends can be those only which are of a kindred nature to those which are mentioned. *State v. Simpson*, 3 Hawks, 620 ; *State v. Sumner*, 10 Vt. 589. But the

rule has no application, because this statute does not attempt an enumeration of the pretenses that shall be held criminal. False tokens are mentioned, but the term is general, not particular, and the same may be said of false writings. The idea suggested to the mind by these is something cognizable to the sight or touch. "Any other false pretense" is a specification equally general, and will embrace other classes.

It is said further that the pretense, to be within the statute, must be one calculated to deceive a man of ordinary prudence, and that if it be a false representation of facts, these facts must be such as were calculated to influence a person of common caution to part with that which was obtained. Is the false representation that one is a "store-keeper" a pretense of this sort? It may be true and yet the man be utterly without responsibility and without character; and in that case the fact of the business would offer no security that a loan made in reliance upon it would be repaid. The term is indefinite; it may mean a wholesale merchant, or a petty dealer in toys or candies; it may imply a principal, or an agent or a servant; it may be applied to one notoriously without capital and who lives by his wits rather than by legitimate trades; in short, disconnected from all else, it can never indicate that the person who bears the designation is one who can safely be trusted with a loan.

All this is true; and if the reliance in accommodating another person with a loan were pecuniary means or responsibility, it might be very conclusive. But notoriously the fact is otherwise. Men are trusted in large amounts every day who have no pecuniary responsibility, and are known to have none. Sometimes the reliance for repayment will be a supposed business ability; sometimes on a business that would be injured by the existence of overdue debts; but most often, perhaps, a reputation for integrity. And if in any case the existence of any particular fact would be likely to beget confidence, there is no reason why a false assertion of its existence should not be a criminal pretense, as much as would be a false assertion of pecuniary responsibility, provided it is equally relied upon, and equally effectual to accomplish the fraud designed.

Pecuniary responsibility is no more a necessary attendant upon a commission in the army than upon the keeping of a store; but the false assertion that one holds such a commission has been held a

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false pretense. *Regina v. Hamilton*, 1 Cox's C. C. 244 ; a. c. no appeal, 9 Q. B. 271 ; *Thomas v. People*, 34 N. Y. 351. So the pretense that one is buying horses as a gentleman's servant may be a criminal false pretense, though the fact of service by itself would not be likely to inspire confidence except in connection with the further fact, expressed or understood, that the master was to pay the purchase price. *Rex v. Dale*, 7 C. & P. 352.

Now it is unquestionable that the fact that one is a store-keeper is one which would be likely to give a degree of confidence and credit. There is an implication, if not of solvency, at least of the possession of considerable means, in the very idea that one is keeping a store ; with no knowledge of his responsibility one would sooner trust him for small sums than if he had no business, or if his business were unknown. A store-keeper is not expected to refuse payment of small debts, whether payment can or cannot be enforced ; it is inconsistent with business prosperity that he should do so, and *prima facie* he will have in his hands the means whereby such debts may be paid. And if such a person, when away from home, had occasion to borrow a few dollars for expenses, a lender would trust, not to his responsibility, but to his honor, for re-payment, and would probably ask no questions further, after learning what was his business.

But the question of the materiality of the pretense is one rather of fact than of law. If it was false, and had a tendency to deceive, and did actually deceive and accomplish the intended fraud, the case is within the statute. *Regina v. Hamilton*, supra.

"The materiality and the influence of the pretenses in question is for the jury to determine on evidence by verdict ; unless some inducing circumstances upon the face of the indictment show that the pretenses are clearly immaterial and could not influence credit. The averment of the pretenses by the indictment is only to give the defendant notice of what may be proved against him ; the mode of obtaining need not be pleaded ; and if any pretense is capable of defrauding, that is sufficient." *Thomas v. People*, supra. The pretenses in that case were that the prisoner was a chaplain in the army, just returned from the army and wanted money to get home with ; and it was said of them : "A court cannot say, as a matter of law, that these were not material representations, and were not calculated to deceive ; and to induce credit ; and were not within the statute, which speaks of obtaining by any false pretense."

In this case the jury has found that the pretense was both false and effectual. There are no exceptions in the case, but the question of sufficiency is raised upon the face of the information itself. It is a question therefore whether the pretense is one which can under any circumstances, be within the statute, and not whether it was so in the particular case under the facts disclosed by the evidence. As was said in *Thomas' case*, we cannot say as a matter of law that the pretense was not within the statute.

The judgment must be affirmed.

Judgment affirmed.

GRAVES and MARSTON, JJ., concurred.

SCHUETZEN BUND V. AGITATIONS VEREIN.

(44 Mich. 313.)

Action — by unlawful society to recover debt.

A society, organized to resist the enforcement of the laws, cannot maintain an action to recover a debt.

ASSUMPSIT. The opinion states the case. The plaintiff had judgment below.

Hawley & Firnane, for plaintiff in error.

T. D. Hawley and E. F. Conely, for defendant in error.

MARSTON, C. J. Action was brought by the Detroit Agitations Verein to recover a sum of money loaned to the plaintiff in error, and from which the plaintiff below received an obligation, a copy of which is given herewith :

"\$900.

DETROIT, *September 1st*, 1870.

"The Detroit Schuetzen Bund hereby acknowledge the receipt of nine hundred dollars (\$900) of the funds of the Detroit Agitations Verein, which amount of \$900, or any part thereof, the Detroit Schuetzen Bund promise to pay to the said Detroit Agitations

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Verein, with interest at ten per cent per annum, within sixty days after demand having been made in writing by the trustees, or other competent officers, of the said Detroit Agitations Verein.

“For the Detroit Schuetzen Bund :

“JOSEPH A. KURTZ, *President*.

“ALBERT SHEU, *Secretary*.

“PHILIP KLING, *Treasurer*.

“GEORGE KITTELBERGER, } *Trustees.*”

“MAX BROEG,

The plaintiff declared as “a body corporate, organized and existing under the laws of the State,” and a copy of its “Constitution” or charter and laws appears in the bill of exceptions. The defense in the court below, as here, rested solely upon the proposition that the plaintiff was not a corporation.

In the briefs of counsel, upon which this case was submitted, we have not been referred to any statute of this State under which the plaintiff had or could have organized as a corporation, nor do we know of any under which a corporation with such objects and aims could be formed. It would seem, from the Constitution and laws of the society, that it was formed principally to oppose the enforcement of a *prima facie* valid act of the legislature of this State.

There may be cases where organization and “agitation” would be proper for the purpose of effecting the modification or repeal of some obnoxious or oppressive law. That the organization in question was designed to and did go farther than this, the record clearly shows. It is alleged therein, that the society had collected from its members, and received from other similar societies, considerable sums of money, “and had disbursed large sums of money, in furtherance of the objects prescribed by the [its] Constitution; *i. e.*, in defending prosecutions under the prohibitory law, in testing the validity of the liquor law and of some ordinances against saloon keepers, influencing legislation, and in some cases in paying the fines of those who were convicted under the laws and ordinances which the society was organized to oppose; and the Verein had also held numerous public meetings at various places for the purpose of influencing public opinion in furtherance of this general purpose.”

No corporation can exist except by force of express law. As already intimated, no statute has been called to our attention which

authorizes the formation of corporations to oppose the enforcement of other statutes, or to agitate for their appeal, or to influence legislation, or to give immunity to convicted parties by paying their fines for them. Every citizen has undoubted right to agitate for such changes in the laws as he may desire, and to be charitable to those whom he may think are wrongfully punished ; but it would be preposterous for the legislature to provide for organizing corporations for such purposes, since the very provision would be an admission that the laws were wrong, and ought to be repealed without agitation or outside influence. When the legislature is thus convinced, it is to be presumed that all needful changes in the laws will at once and in a direct manner be made, in the interest of peace, good order and justice, without its calling upon the people for agitation or excitement as a preliminary thereto.

Finding no law for the incorporation of this society, the judgment must be reversed. This would be the necessary result, even if the purpose of the society were one in the propriety or usefulness of which every citizen concurred, since the law does not authorize an unincorporated society to bring suit in its society name.

It follows that the judgment must be reversed with costs of both courts.

Judgment reversed.

The other justices concurred.

HEYMAN V. COVELL.

(44 Mich. 332.)

Conflict of law — seizure by Federal marshal on execution of third person's goods

The owner of goods, seized by a United States marshal on execution against another person, may maintain replevin therefor in a State court.

REPLEVIN. The opinion states the case. The defendant had judgment below.

Norris & Uhl, for plaintiff in error.

Butterfield & Withey, for defendant in error.

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CAMPBELL, J. Mrs. Heyman, the plaintiff, sued defendant in replevin for certain goods, which, as we understand the finding, the court below held were unlawfully taken from her by defendant, but nevertheless gave judgment in his favor. Defendant at the time the goods were replevied held them as United States deputy marshal, under an execution issued from the Circuit Court of the United States for the western district of Michigan, against one Adolph Heyman who was plaintiff's husband. There are no legal conclusions set out in the finding, and there are some facts set out which would seem to indicate that there were questions discussed concerning the validity of plaintiff's title. We have had some doubt whether the court below did not err in failing to find more specifically as requested. But the facts actually found show title in plaintiff and show nothing to controvert it. We shall assume therefore what has been assumed by counsel for both parties, that the ground of the decision was that defendant's possession, though wrongful, must prevail over State process issued in favor of the real owner. And we shall consider the record as involving the question whether a United States marshal, by seizing the property of a stranger to the execution in his hands, can cut off the right of the owner to recover his property thus wrongfully seized. For the right is effectually cut off if it cannot be replevied in a State court, when there is no remedy provided by law for trying the title anywhere else.

The case supposed to stand in the way of this remedy is *Freeman v. Howe*, 24 How. 450. The language of that case does, when taken by itself, tend to sustain the claim of defendant, and if it were applicable here, and not affected by subsequent decisions, we should be disposed (as stated in *Carew v. Matthews*, 41 Mich. 576) to regard it as perhaps disposing of the case. But when this decision is considered in the light of other decisions which are recognized as binding in the United States Courts, we think it has no force when applied to the issue before us.

The only ground of the decision was that the property there in controversy was in the custody of the United States Court for legal purposes, and that an effectual remedy existed in that court to try and determine the rights of the adverse claimant. If this were so there was little room for discussion. The remedy there suggested was a bill in equity, which it was said would not be treated as a separate suit but only as a collateral proceeding in the same suit. And reference was there made to some other cases in which the

question decided was, not whether one jurisdiction could interfere with another, but whether the remedy in equity was a proper remedy to protect the particular right in controversy. In *Freeman v. Howe*, there can be little doubt that there was a remedy in equity so far as the subject-matter is concerned, for the complaining parties were railroad mortgagees in trust, and the property replevied by them was taken in that capacity against a levy not by execution, but under mesne process.

There was certainly some force in the suggestion that the remedy was there adequate, and the fact that the property was in custody of the court was assumed. Possibly that is true in some cases in regard to property held under mesne process. But such has not been the view concerning property held under final process, and it has been uniformly held that a marshal is a trespasser and in no way protected by his process when he seizes the property of a stranger.

In *Buck v. Colbath*, 3 Wall. 334, the action was trespass, and therefore all that was said about other remedies was *obiter*. But it was distinctly intimated that the difficulty did not arise except concerning property actually or constructively in the possession of the court, and while litigation was still pending. Property under mesne process is in some cases the only basis of jurisdiction, and it is often subject to disposition for various purposes *pendente lite*, so that it may not only be discharged from seizure, but may sometimes be dealt with otherwise. This creates at least a colorable, if not a real distinction, and may give some force to the claim that it is in the custody of the court, although we are not prepared to say the distinction is usually in fact very important. The case of *Buck v. Colbath* is significant in confining the doctrine of conflict to interference with the action of courts, and in holding that a marshal who levies on the property of a stranger is in no sense acting under process unless the writ directs the seizure of the specific property taken. The distinction between writs against specific property and those against undescribed property of named persons is made the turning point. And it was said emphatically that "the plaintiff in error is mistaken when he asserts that the suit in the Federal Court drew to it the question of title to the property, and that the suit in the State Court against the marshal could not withdraw that issue from the former court. No such issue was before it, or was likely to come before it, in the usual course of proceeding in such a suit."

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In the subsequent case of *McKee v. Rains*, 10 Wall. 22, it was held that a trespass suit by a third person against a marshal could not be removed into a court of the United States, because his levy could not be regarded as made under any authority of the United States. This is certainly equivalent to holding that he is no better off than if he had no process, and it is difficult to conceive how it leaves any room for holding that a disturbance of his wrongful possession is an interference with the court.

It would not be — we suppose — competent for Congress or any State, even by positive enactment, to deprive the owners of property of the right to vindicate their title by legal process in a judicial trial. There is no legislation which provides any method whereby Mrs. Heyman could secure her rights in the United States Court against Covell. Unless she has such a remedy in due form of law, her only resort must be to the State courts, and this is recognized in *McKee v. Rains* as well as in *Slocum v. Mayberry*, 2 Wheat. 2. It was indeed held in *Freeman v. Howe* that equity would relieve in that particular instance, and was said that it would in any case of wrongful levy on a third person's goods. If this were so, the case would not be difficult of redress. But it has since been held that there is no such remedy. In *Van Norden v. Morton*, 99 U. S. 378, a bill in equity was filed in the Circuit Court of the United States for the district of Louisiana, to secure protection and restoration against a marshal's levy under an execution from the same court, and the Circuit Court made such a decree. But on appeal to the United States Supreme Court it was held that replevin was the proper remedy to regain possession, or some similar proceeding in the nature of a common-law replevin, and that equity had no jurisdiction. The decree was reversed for want of jurisdiction, without prejudice to an action at law or other redress.

If there is no remedy by bill in equity then it follows that a common-law action is the proper redress, and such an action can only be brought in a court of the United States where the parties are such as to confer jurisdiction; and in such cases the statutes have made the jurisdiction concurrent with power of removal under certain circumstances. In the present case it does not appear that suit could have been brought anywhere but in the State court, and the case has gone to judgment in the usual course.

We think there was no ground for refusing redress to plaintiff, and that she was entitled to judgment on the finding.

 Eaton v. Gay.

Judgment must be reversed with costs and judgment entered for plaintiff with nominal damages of six cents.

Judgment reversed.

MARSTON, C. J., and GRAVES, J., concurred. COOLEY, J., dissented.

EATON V. GAY.

(44 Mich. 481.)

Contract—for supper—extras ordered by guests.

One who contracts for a supper, at a fixed price per head, is not liable for extras ordered by the guests.

ASSUMPSIT. The opinion states the case. The plaintiff had judgment below.

C. M. Swift and E. F. Conely, for plaintiff in error.

Moore & Moore, for defendants in error.

COOLEY, J. This is a dispute respecting the price of a bill for wine and cigars furnished at a supper which the defendants in error, Gay & Van Norman, had provided for a society known as the Ancient Order of Foresters. It seems that Eaton, the plaintiff in error, had ordered the supper, and it was agreed that the charge for it should be one dollar for each person partaking. The testimony of Maxwell, the business manager for Gay & Van Norman, tended to prove that wine and cigars were not to be furnished at the price named, but that Eaton told him after the agreement had been made, to furnish wine and whatever else was necessary, and that under this direction he did furnish wine and cigars as ordered by the guests, and that these were extra. Eaton, on the other hand, testified that it was expressly agreed between himself and Maxwell that wine was to be furnished as part of the bill of fare at the price agreed upon.

The Circuit judge instructed the jury as follows: 1. That if they found that Eaton authorized the furnishing of the wine and

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cigars by the plaintiffs beyond the regular supper, or agreed to pay for them, then the plaintiffs are entitled to recover the value of the wine and cigars. 2. If Eaton only agreed to pay for the supper one dollar a guest, and the plaintiffs supplied the wine and cigars on their own account, then the defendant is entitled to recover. 3. If there was no contract whatever about the wines, and they were furnished and drunk at the supper, and Eaton knew they were being supplied to the guests at the supper which he had ordered, and made no objection to their being so supplied, then there arose an implied contract on his part to pay what the wines and cigars were reasonably worth, and plaintiffs would be entitled to recover to that extent,—the remainder of the bill having been paid.

We cannot assent to this third proposition. If Eaton agreed with Gay & Van Norman upon the bill of fare and the price, he thereby limited what could be furnished on his account, and he had a right to expect that any printed bill which should be placed before the guests would be limited accordingly. No guest would then feel at liberty to call for any thing not there appearing, and if he did, and it was furnished to him, it would be a matter between himself and the proprietors, with which Eaton could have no right to concern himself. It would be an extraordinary rule of law that would compel Eaton, under such circumstances, when he saw the guests partaking of wine, to give formal notice to the proprietors that he should pay no debts of their contracting. He had made his contract in advance and stipulated what his liability should be ; and the guests were not his agents for the purpose of increasing this liability. If they ordered what he had not bargained for, he not only had a right to assume that they did this on some understanding, express or implied, with the proprietors, but common courtesy required him to refrain from interfering. The supper as agreed upon was his affair ; the furnishing of extras was *inter alios*, and the proprietors could no more call upon him to pay for them, on the basis of implied contract, than upon any stranger.

The judgment must be reversed with costs and a new trial ordered.

Judgment reversed.

The other justices concurred.

EBERTS V. SELOVER.

(44 Mich. 519.)

Contract — subscription — agency — ratification.

A book agent solicited a justice of the peace to subscribe for a book, the price of which was \$10, and the justice signed his subscription book, receiving from the agent a written agreement, in the name of the principals, to accept for the price all his office fees from that time until the delivery of the book. The subscription book so signed contained a printed contract to take the book at the subscription price, a warning to patrons not to sign unless they expected to pay that price, and a "rule" that "no promise made by an agent which interferes with the intent of printed contract shall be valid." The principals delivered the book, and sued for the subscription price of \$10. The defendant brought the fees, \$4.37, into court. *Held*, that the plaintiffs could not recover.

ASSUMPSIT. The opinion states the case. The defendant had judgment below.

Hiram Kimball, for plaintiff in error.

John R. Champion, for defendant in error.

COOLEY, J. This is an action brought to recover the subscription price of a local history. The subscription was obtained by an agent of the plaintiffs, and defendant signed his name to a promise to pay ten dollars on the delivery of the book. This promise was printed in a little book, made use of for the purpose of obtaining such subscriptions, and on the opposite page, in sight of one signing, was a reference to "rules to agents," printed on the first page of the book. One of these rules was that "no promise or statement made by an agent which interferes with the intent of printed contract shall be valid," and patrons were warned under no circumstances to permit themselves to be persuaded into signing the subscription unless they expected to pay the price charged. From the evidence it appears that when Schenck, the agent, solicited his subscription the defendant was not inclined to give it, but finally told the agent he would take it provided his fees in the office of justice, then held by him, which should accrue from that time to

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the time of delivery of the book should be received as an equivalent. The agent assented, and defendant signed the subscription, receiving at the same time from the agent the following paper :

“COLDWATER, April 29, 1878.

Mr. Isaac M. Selover gives his order for one copy of our history, for which he agrees to pay on delivery all the proceeds of his office as justice from now till the delivery of said history.

EBERTS & ABBOTT, *per Schenck.*”

The plaintiffs claim that the history was duly delivered, and they demand the subscription price, repudiating the undertaking of the agent to receive any thing else, as being in excess of his authority and void. The defendant relies on that undertaking, and has brought into court \$4.27 as the amount of his fees as justice for the period named. This statement of facts presents the questions at issue so far as they concern the merits.

It may be perfectly true, as the plaintiffs insist, that this undertaking of the agent was in excess of his authority ; that the defendant was fairly notified by the entries in the book of that fact, and that consequently the plaintiffs were not bound by it, unless they subsequently ratified it. Unfortunately for their case, the determination that the act of the agent in giving this paper was void does not by any means settle the fact of defendant's liability upon the subscription.

The plaintiffs' case requires that they shall make out a contract for the purchase of their book. To do this, it is essential that they show that the minds of the parties met on some distinct and definite terms. The subscription standing alone shows this, for it shows, apparently, that defendant agreed to take the book and pay therefor on delivery the sum of ten dollars. But the contemporaneous paper given back by the agent constitutes a part of the same contract, and the two must be taken and considered together. *Bronson v. Green* Wal. Ch. 56 ; *Dudgeon v. Haggart*, 17 Mich. 275. Taking the two together it appears that the defendant never assented to any purchase except upon the terms that plaintiffs should accept his justice's fees for the period named in full payment for the book. If this part of the agreement is void, the whole falls to the ground, for defendant has assented to none of which this is not a part.

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When plaintiffs discovered what their agent had done, two courses were open to them: to ratify his contract, or to repudiate it. If they ratified it, they must accept what he agreed to take. If they repudiated it, they must decline to deliver the book under it. But they cannot ratify so far as it favors them and repudiate so far as it does not accord with their interests. They must deal with the defendant's undertaking as a whole, and cannot make a new contract by a selection of stipulations to which separately he has never assented.

The judgment must be affirmed with costs.

Judgment affirmed.

The other justices concurred.

 BELLER V. SCHULTZ.

(44 Mich. 529.)

Bailment—loan of chattels—damage by elements.

The owner of a flag lent it to his employer, helped to hoist it on the employer's building, and left it flying when he went away. It was afterward injured by a hailstorm. *Held*, in the absence of proof of negligence, that the borrower was not liable for the injury.

ASSUMPSIT. The opinion states the case. The plaintiff had judgment below.

George H. Prentiss, for plaintiff in error.

Van Dyke & Brownson, for defendant in error.

GRAVES, J. Schultz went to work for Beller and took two flags with him, a large one and a small one. He lent the large one to Beller and helped to put it up on Beller's building. He went away without taking the small one, and permitted the other to remain flying where he had assisted in placing it. Subsequently a hailstorm injured it. He sent for both flags and received the small one but failed to receive the other. It was worth \$20. He sued in

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assumpsit before a justice for the value, and on these facts was allowed to recover, and the Circuit Court on *certiorari* affirmed the judgment.

There was no cause of action on the facts. Even where the loan is gratuitous the borrower is not an insurer. The thing is subject to the kind and mode of use for which it is designed, and the risk of such losses as are fairly incident thereto is with the owner unless the bailee has failed in his duty to anticipate and guard against the danger. The thing here was made on purpose to be used as a flag, and the propriety of exposing it as one in the very position and in the very season selected cannot be questioned by Schultz; because in fact that exposure was in substance his own act. The bailment is not shown to have been abused. There is no proof that Beller failed in his duty. If there was any want of such care to guard the flag, against the injury from storms as the law would consider due which is not probable, it was for Schultz to give evidence to prove it. He gave none whatever, and it is not to be presumed that Beller was in fault.

The failure to get the flag back is not traced to Beller. The case goes no further than to say that Schultz sent for it and did not receive it. Where the fault lay, if there was any, does not appear and cannot be inferred. Certainly it cannot be imputed, without proof, to Beller. It may have been obtained from him in answer to Schultz's request, and been miscarried or otherwise disposed of thereafter without his, Beller's, agency. Or it may be that no request was made to Beller to deliver or surrender it. There were no facts to affect Beller with liability in any form, and it is needless to inquire whether assumpsit might have been maintained in case the evidence had shown an abuse of the alleged bailment.

The judgment must be reversed with the costs of all the courts.

Judgment reversed.

The other judges concurred.

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BROOKS V. COOK.

(44 Mich. 617.)

Civil damage act—construction—right of action.

Under a statute which gives to "every wife, child, parent, guardian, husband or other person," a right of action, for injury by reason of the intoxication of any person, against the seller of the liquors, the intoxicated person himself has no right of action against the seller for money stolen from him when drunk.*

DEBT on a liquor seller's bond under the civil damage act. The opinion states the case. The plaintiffs had judgment below.

D. E. Corbitt, for plaintiffs in error.

Stuart & Sweet, for defendant in error.

COOLEY, J. The question in this case is whether one who becomes intoxicated in a saloon, upon liquor there sold to him by the keeper, and who while in that condition has his pockets picked, may maintain an action against the keeper to recover the money taken from him.

The question arises under Act No. 193 of 1877 commonly called the police act, the third section of which provides among other things that "every wife, child, parent, guardian, husband or other person, who shall be injured in person and property or means of support, by any intoxicated person, or by the reason of the intoxication of any person, or by reason of the selling, giving or furnishing any spirituous, intoxicating, fermented or malt liquors to any person, shall have a right of action in his or her own name against any person or persons who shall, by selling or giving any intoxicating or malt liquor, have caused or contributed to the intoxication of such person or persons, or who have caused or contributed to such injury."

The question is one of the construction of the statute. Is the person to whom the liquor is sold, etc., and who in consequence sustains an injury, one of the persons for whose benefit the statute is passed? The Circuit Court was of opinion that he is.

* See *Brown v. Thompson* (14 Bush, 638), 20 Am. Rep. 416.

So far as the statute attempts any enumeration of persons who may sue, they all stand in some one of the domestic relations to the person to whom the liquor is sold, given or furnished. To that extent the statute unquestionably contemplates that there shall be three persons concerned; the person selling, giving or furnishing, the person receiving and causing an injury, and the person injured. But there might be other cases equally meritorious with these (see *English v. Beard*, 51 Ind. 489; *Bodge v. Hughes*, 53 N. H. 614); and therefore after enumerating wife, child, parent, guardian and husband, the statute extends the right of action to other persons injured. Does it intend among the other persons who may sue to include the person himself whose intoxication causes or is the occasion or reason of the injury?

Doubtless the statute might have extended its benefits to the intoxicated person, but if such were the intent it is surprising that it was not distinctly and unequivocally expressed. It was as easy to designate the party himself as it was his wife, child, guardian, etc. Moreover the man himself may generally be supposed to be injured in some degree by intoxication, so that his case would furnish the most frequent occasion for a suit if he should see fit to resort to legal proceedings. It would be very remarkable that a statute in enumerating the persons who should share in its benefits should omit to name the very one who would most often be entitled to its aid. But it is a sensible and well understood rule of construction that when after an enumeration the statute employs some general term to embrace other cases, the other cases must be understood to be cases of the same general character, sort or kind with those named. *Hawkins v. Great Western R. R. Co.*, 17 Mich. 57; *McDade v. People*, 29 id. 50, and cases cited. Apply this rule here, and the party intoxicated is excluded. The persons enumerated are persons who stand to him in special relations, and it is therefore to be assumed that "any other person" who may sue must also stand to him in some special relation so as to be injured by his intoxication or by the sale, etc., to him. A creditor might perhaps stand in that relation under some circumstances, or a contractor, or servant, or the master of a vessel, or a traveler passing him in the street, and so on. But he could not stand in any such relation to himself, and therefore cannot be understood as embraced in the terms, "wife, child, parent, guardian, husband or other person," injured in person, property or

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means of support by himself, or by reason of his intoxication or by the sale, etc., of intoxicating drinks to himself. The statute evidently contemplates three parties—seller, receiver and injured party—in all cases.

It is possible that the facts of any particular case may be such as to connect the saloon keeper with the injury or loss in such a way as to give a right of action at the common law. What we have said above has no reference to or bearing upon such a case.

The judgment must be reversed with costs of all the courts.

Judgment reversed.

The other justices concurred.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

BROWN V. WINONA & ST. PETER RAILROAD COMPANY.

(37 Minn. 162.)

Master and servant — negligence — co-servant.

A master is not liable to one servant for injuries from the negligence of another servant in the same common employment, although the negligent servant is superior in authority or overseer of the one injured.

ACTION of damages for personal injuries by negligence. The opinion states the case. The plaintiff had judgment below.

Wilson & Gale, for appellant.

S. L. Pierce, J. M. Thompson and B. F. Webber, for respondents.

GILFILLAN, C. J. Plaintiff was employed as a section man on the railroad of defendant. One Jacks was employed by it as "road-master." They, with others, were engaged in raising several wrecked freight cars, when plaintiff received a serious injury, by

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reason, as the complaint alleges, of the negligence, carelessness and unskillfulness of Jacks. There is no allegation of negligence or the part of defendant in employing Jacks, nor of the use of improper, defective or insufficient machinery to raise the wreck; and it appears from the evidence, beyond any question, that Jacks was a competent and proper person for the work in which he was engaged, and that the machinery was proper and sufficient; so that plaintiff's claim to recover rests on the alleged negligence and carelessness of Jacks in the manner of doing or ordering the work.

As appears from the evidence, the ordinary duties of section men are, under their foreman, to keep the track within their section in order, and, when called on by the road-master, to assist in raising and removing wrecked cars, even though within another section. The business of the "road-master" is to keep the track in order along the entire line, as we infer from the evidence, including the raising and removing of wrecked cars. For the purpose of performing his duties, he has authority over the section men. As to what he shall do, and when he shall do it, he is under the orders and control of the superintendent. He is the overseer of those he calls to assist him. In the manner of working, unless otherwise directed by the superintendent, he is left to his own judgment and discretion. But he has nothing to do with employing or discharging men, or providing machinery or tools to work with. Above him, in respect to authority, are first, the superintendent; next, the manager and the president and directors of the company.

That as a general rule the master is not liable to one servant for an injury caused by the negligence of another servant in the same common employment, is held by every court which decides according to the principles of the common law. This court so held in *Foster v. Minn. Central Ry. Co.*, 14 Minn. 360. The rule has strong considerations of public policy, as well as private justice, to sustain it. In the case of a stranger, the rule *respondet superior* applies in all its force. In such case, the act of the servant within the scope of his employment, however inferior may be his grade or authority, is the act of the master, and his negligence is the negligence of the master, for the consequences of which the latter is responsible, as he is for his personal act and negligence. The rights of the stranger against the master are not modified by any contract relation. The duties and rights of master and servant, with respect to each other,

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are controlled by the contract of employment, which impliedly imposes duties and risks upon each. No case, not governed by statute, holds the master liable at all events to a servant injured by the negligence of another servant in the same employment. No case intimates that the master is an insurer of the servant against possible injury.

The duties which the contract of employment imposes on the master are, that where machinery or instrumentalities are to be used in the work, he will exercise due care and caution in providing such as are fit and safe; and where co-servants are to be employed, he will use due care and caution in selecting such as are competent and careful. For injuries arising from failure to perform these duties the master is liable, and he cannot avoid the liability by deputing another to perform them in his stead. There are cases which appear to add to these duties the duty not to have the servant set, either by the master or by one whom he places in authority over him to do work more dangerous than he engaged to do, or to do unusually hazardous work, where, from youthfulness or feebleness of intellect, the servant may be supposed to be unable to appreciate the danger and guard against it, or the hazards of which are known to the master, but are unknown to, and not open to the observation of, the servant. There is nothing in this case to make it necessary for us to decide on these propositions, or do more than allude to, without expressing any opinion on them.

All the authorities, where there is no statute on the subject, agree that in the contract of employment the servant assumes such risks as — the master having performed the duties we have mentioned — are still necessarily incident to the business or work which he engages to do, and which risks he may be taken to have in mind when he enters the employment. Where he is to work with or about machinery, as notwithstanding any degree of care in providing it, there is still, ordinarily, the possibility of injury from its use, he must be supposed to take their risk on himself; and because, notwithstanding the utmost care and caution in selecting them, there is danger of injury from the negligence of fellow-servants, he is held to assume that risk. These are risks which are necessarily incident to the employment. As said by the court in *Brothers v. Cartter*, 52 Mo. 373, 375; s. c., 14 Am. Rep. 424: "If a workman or servant is to work in conjunction with others, he must know that the carelessness of his fellow-servants may be productive of in-

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jury to himself, and that he must know that neither care nor diligence by the master can prevent the want of due care and caution on the part of his fellow-servants. The servant on entering upon the employment is supposed to know and assume this risk." The reason here given for holding the servant to assume the risk of injury from negligence of his fellow-servant—to wit, that he must know, when he enters upon the employment, that neither care nor diligence by the master can prevent it—we think indicates what servants are to be regarded as fellow-servants, the risk of whose negligence is assumed by a servant when entering upon the employment.

It is upon this point that the authorities disagree. Some courts, the Supreme Court of Ohio being the leading one, hold that where the injured servant is subordinate to him whose negligence causes the injury, they are not "fellow-servants," and the master is liable. On the other hand, the great majority of courts, both in this country and in England, hold that mere difference in grade of employment, or in authority, with respect to each other, does not remove them from the class of fellow-servants as regards the liability of the master for injuries to one caused by the negligence of the other. If the servant is supposed to assume the risks which the master, with due care and diligence, cannot prevent, and we think it is so, then he assumes the risks from negligence of those servants who may be placed over him as superior servants or overseers, as well as those of equal grade with himself. For in respect to such overseer or superior servants, the master when he has used due care in selecting them cannot prevent their casual negligence of those inferior in grade. This conclusion is decisive of this case, for the road-master was no more than a superior servant or overseer, the risk of whose negligence was assumed by plaintiff when he entered upon the employment.

Order reversed and new trial ordered.

Order reversed.

O'CONNOR V. CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY CO.

(27 Minn. 166.)

Evidence — res gesta — declarations of servant.

SUFFICIENTLY reported in note, 36 Am. Rep. 828.

Ricker v. Charter Oak Life Insurance Company.

RICKER V. CHARTER OAK LIFE INSURANCE COMPANY.

(27 Minn. 198.)

Insurance—life—father for children—surrender by father.

A man procured a policy of insurance on his life, payable to his wife, if living, otherwise to his children, or their guardian. The wife died leaving children. The insured had then paid all the premiums ever required by the policy. Afterward he remarried and had another child, surrendered the policy, and took a paid-up policy for the benefit of the second wife. *Held*, invalid as against his children, and that all the children by both marriages were entitled to share. (*See note, p. 292.*)

ACTION on a policy of life insurance. The opinion states the case. The plaintiff had judgment below.

Lochren, McNair & Gilfillan, for appellant.

Woods & Babcock, for respondents.

CORNELL, J. The original policy was issued upon the application of Samuel Stanchfield, the person whose life was insured, and all the premiums stipulated for were paid by him before the death of Elizabeth A. Stanchfield, who was his wife. By its terms the amount of the insurance was made payable, upon the death of the insured to Elizabeth A. Stanchfield, his said wife, and, in case of her death before his decease, the same was to be paid to his children, or to their guardian, if minors, for their use and benefit. The said Elizabeth died intestate in July, 1874, leaving surviving her said husband, the plaintiffs herein, and one Joel B. Stanchfield, who were the issue of their marriage. After this Samuel Stanchfield married the intervenor herein, by whom he had one child, Carl S. Stanchfield, both of whom are now living. On February 13, 1878, Samuel Stanchfield died. After the decease of his former wife and his marriage with the intervenor, Louisa Stanchfield, the insured surrendered the original policy, which was cancelled, and a new one was issued in its place and as a substitute therefor, bearing the same date, and containing the same terms and conditions, save that it was therein provided that it should inure "to the sole and sepa-

rate use and benefit" of said intervenor, Louisa Stanchfield, his second wife. The legal effect of this surrender and change, and the competency of Samuel Stanchfield to make it without the consent of his children, are the important questions presented for adjudication in this case.

Upon the allegations and admissions in the pleadings it must be presumed that the original policy was made, and its stipulations were to be performed, in the State of Connecticut, where the defendant company was created, organized, and did its business, and hence its legal effect, and the rights and obligations of the parties under it depend upon the laws of that State; but as no evidence appears to have been given as to what those laws were, they are to be taken as identical with the common law of this State, independent of any statute upon the subject. Upon this theory the case has been argued, and it will be considered and determined accordingly.

The general rule upon the subject, as stated by Mr. Bliss, is this: "That a policy of life insurance, and the money to become due under it, belong, the moment it is issued, to the person or persons named in it as beneficiary or beneficiaries, and that there is no power in the person procuring the insurance, by any act of his, by deed or by will, to transfer to any other person the interest of the person or persons so named. The person designated in the policy is the proper person to receipt for and to sue for the money. The principle is that the rights under the policy become vested immediately upon its being issued, so that no person other than those designated in it can assign or surrender it, and that in such assignment or surrender all the persons must concur, or the interest of those not concurring is not affected." Bliss on Life Ins. (2d ed.) 6, §§ 317, 337. This is held to be the rule in *Succession of Kugler*, 23 La. Ann. 455.

Upon the facts in the case at bar however the court is not called upon to consider the rule as applied to a case where a portion of the premiums which constitute the consideration for the insurance still remains unpaid, and where the policy is liable to forfeiture in case of non-payment. Here the entire amount of the premiums stipulated for in the policy had been paid before the death of the wife, Elizabeth A. Stanchfield, and the subsequent attempted surrender of the policy by her husband, whose life was insured. The case therefore stands in the same position it would if the whole

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consideration for the policy had been paid by the party procuring it at the time of its execution and delivery by the company; and the question is, whether, having made such payment, and taken out a policy for the benefit of his said wife and his children, payable in express terms to her, or in the event of her prior decease, to his children, it was competent for him to surrender the same and take another policy in consideration of such surrender, and in lieu of the original, for the benefit of another party.

This question, it seems to the court, must be answered in the negative. The transaction on the part of Mr. Stanchfield was in the nature of an irrevocable and executed voluntary settlement upon his wife and children of the sum secured to be paid by the policy at his death, conditioned that the same should be paid to her for her benefit should she survive him; but if not, then the same should be paid to his children, or if minors, to their guardian, for their sole use and benefit. Nothing remained to be done on his part to make the intended gift of the policy to the beneficiaries therein named complete and effectual as against himself and all mere volunteers claiming under him. In paying for the insurance and procuring the policy to be issued, payable in express terms, upon his death, to his said wife, Elizabeth, if then living, and if not to his children, for their sole use and benefit, without any condition or stipulation reserving a right to change or alter any of the terms of the agreement, he did all that could well be done, under the circumstances, in the execution of an intention to vest in his said appointees the entire interest in the policy, and all rights thereunder. *Adams v. Brackett*, 5 Metc. 280; *Landrum v. Knowles*, 22 N. J. Eq. 594.

What he did was a "clear and distinct act," wholly divesting himself of all ownership or control over the money paid for the insurance, disclaiming any interest in the policy, or intention to take or hold it for himself or his legal representatives, at the same time putting it beyond his power so to do, by the stipulation obligating the company to pay the sum insured, whenever it should become due, to such of the persons named in the policy as might then be entitled thereto by its terms. Taking the delivery of the policy from the company, under these circumstances, can only be construed as an act of acceptance for the designated beneficiaries, and his subsequent holding of the same as that of a naked depositary, without any interest, for those entitled thereto. Such con-

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duct on the part of the husband and father was both natural and proper, and it raises no presumption against the theory of a completed transaction on his part, as evidenced by his other acts. As the insured had no legal or equitable interest in the policy at the time of its surrender and cancellation, the act was a nullity, and could not affect the rights of his children, to whom it then belonged, and who alone could release the company from the obligations it contained. We concur in the opinion of the District Court that "his children" included the issue of both marriages.

Order affirmed.

NOTE BY THE REPORTER. — In *Brockhaus v. Kemna*, 7 Fed. Rep. 606, it was held that the beneficiary named in a policy of life insurance has a vested interest in the proceeds of a paid-up policy, given in exchange for such life policy. A written agreement, executed before the surrender of the life policy, stipulating that the said proceeds should be placed in the hands of a trustee, and distributed as therein provided, is voidable by an infant beneficiary when such agreement did not constitute the substantial consideration for the exchange of the policies. Authorities referred to, *Clark v. Durand*, 12 Wis. 23; *Kerman v. Howard*, 23 Id. 108; *Ricker v. Charter Oak Insurance Co.*, 27 Minn. 198; *Charter Oak Ins. Co. v. Brant*, 47 Mo. 419; s. c., 4 Am. Rep. 233; *Gamble v. Covenant Ins. Co.*, 50 Id. 44; *Ricker v. Charter Oak Ins. Co.*, 6 N. W. Rep. 771; *Landrum v. Knowles*, 22 N. J. Eq. 394; *Bliss L. Ins.*, § 317.

In *Robinson v. Duval*, Kentucky Court of Appeals, Sept., 1880, the decision was as follows: The statutes of Kentucky provide thus: "A policy of insurance on the life of any person, expressed to be for the use of any married woman, whether procured by herself, her husband, or any other person, shall inure to her separate use and benefit and that of her children, independently of her husband or his creditors, or the person effecting the claim or his creditors." "When a policy is effected by any person on his own life, or on the life of another, expressed to be for the benefit of a third person, the person for whose benefit it was made shall be entitled thereto against the creditors and the representatives of the person effecting the same." C. insured his life in 1872 for \$5,000, payable to his wife and children or their representatives. At that time insured had three children, all minors and unmarried. In a few days thereafter his wife died. He continued to pay the annual premiums as they fell due, until 1878, when he died, having survived all his children, two of whom died in infancy and unmarried, and one, having married, left an only child, D., and her husband surviving her. Before his death, and after the death of all his children, the insured assigned and delivered the policy to his niece, R., intending it as a gift to her. Held, that the policy should be construed as if it were payable to such of the children as should survive the insured, and the surviving issue of such as might die during life. The insured had no interest in the policy and the assignment by him to R. gave her no right to any part of the proceeds. When the wife of insured died her interest in the policy inured, under the statute, to the benefit of her children. When one of the children subsequently died without leaving issue, and the policy was again renewed by the payment of the annual premium, there was in a modified sense a new contract (*Thompson v. Cundiff*, 11 Bush, 573), which inured to the benefit of the children then living, there being no issue of those who were dead. So that at the death of D., the last survivor of the children of the insured, she was the sole beneficiary. At the time the policy was last renewed before her death, D. was the only surviving child of the insured, and as she was the only living person answering the description of beneficiaries as contained in the policy, as the other beneficiaries had died without issue, it is to be taken to have been renewed for her sole benefit. When it was last renewed she was dead, and there was no person living answering the description except her surviving child, who is her representative within the meaning of that word as used in the policy. In *Insurance*

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Ch. v. Palmer, 42 Conn. 60; s. c., 19 Am. Rep. 530, the policy was payable to the wife if she survived her husband, if not, to their children. The husband survived the wife, and one of the children died, during the life of the father, leaving issue. It was held that the issue took the interest to which his father would have been entitled if he had survived the insured.

In *Glantz v. Gloecker*, Illinois Appellate Court, 1882, it was held that where a father procured an insurance upon his life for the benefit of his daughter, received and retained possession of the policy, and regularly paid the premiums up to the time of her death, he cannot retain possession of the policy, but will be required to deliver it up to the administrator of her estate. The court said: "It seems to be clear, upon both principle and authority, that appellant, not being a party to the contract has no right to control it, as against the beneficiary named in it: *North Am. Life Ins. Co. v. Wilson*, 111 Mass. 548.

"An elementary writer, whose work is frequently cited by the courts with approbation, lays down the general rule thus: 'We apprehend the general rule to be, that a policy, and the money to become due under it, belong, the moment it is issued, to the person or persons named in it as the beneficiary or beneficiaries, and that there is no power in the person procuring the insurance, by any act of his, by deed or by will, to transfer to any other person the interest of the person named. An irrevocable trust is created.' Bliss on Life Ins., 2d ed., p. 517.

"For same doctrine, in analogous cases, see notes to *Ellison v. Ellison*, 1 Lead. Cases. in Eq. 4th Am. ed. 421.

"If the transaction in question constituted an irrevocable trust, and a trust perfectly created, then, by the settled doctrine in equity, it is wholly immaterial whether appellant had ever delivered the policy to his daughter or not: *Fortescue v. Barnett*, 3 Myl. & K. 25; *Otis v. Beckwith*, 49 Ill. 121, and cases there cited. Nor is it material whether the daughter occupied the position of volunteer or not: *Badgely v. Votruba*, 63 Ill. 25; s. c., 15 Am. Rep. 541.

"Suppose Louis Glantz, the insured, had died without having ever delivered the policy to the assured, his daughter, would that make any difference as to her having a vested interest in the policy and the money thereby payable? Appellant held the policy merely for the assured. It is a part of the agreed case, that he never charged her or her estate for any money he paid as premium. He therefore had no lien upon it. He held it therefore as trustee, and in no other character. If at any time there was danger that he would fail to pay the premium, and thus let the policy lapse, we perceive no reason why the *cestui que trust* could not apply to a court of equity to have it handed over to her, if that were necessary to the preservation of her interest in it. And if that be necessary now, the same relief may be had by her administrator. This conclusion follows, if the transaction constituted a completed trust, in which case the aid of a court of equity may be invoked by a volunteer to carry the trust into effect.

"In the case of *Lemon v. Phantz Mut. L. Ins. Co.*, 38 Conn. 800, it seems to have been assumed that a delivery of the policy by the insured to the beneficiary was essential to the vesting any rights in the latter, though the question was not decided. Such a doctrine would seem to be contrary to that which prevails in analogous cases, which may easily be called to mind, such as assignments for the benefit of creditors, or where, by the provisions of a deed, a portion of the purchase-money was to be paid to the grandson of the vendor. *Gault v. Trumbo*, 17 B. Mon. 682."

PORTER V. CHANDLER.

(27 Minn. 301.)

Contract — to farm on shares.

The owner of a farm employed another to till and carry on his farm, and for compensation agreed to allow him one half of all the grain raised, deduct

ing advances and other claims. *Held*, a contract of hiring, and that the employee was not a part owner of such grain.*

REPLEVIN. The opinion states the case. The plaintiff had judgment below.

J. H. Case, for appellant.

Edgerton & Edgerton, for respondent.

GILFILLAN, C. J. Replevin to recover 444 bushels of wheat. The wheat was grown on a farm belonging to plaintiff, under a contract between him and Henry and A. Linnemann, by which, in substance, he hired and employed them to till and carry on the farm from January 2, 1877, to November 2, 1877, at their own cost and expense; to sow 80 acres in wheat, 10 acres in oats, and 10 acres in corn; to harvest, thresh and clean the grain, in good order for market, and before October 15th to place it in bins and places designated by him on the farm, all the work to be done under his orders and directions. In compensation for which he agreed to allow them, at the end of the term, one-half of all the grain raised, excepting and deducting therefrom all claims for advances by him, and all other claims due and demands he might have against them at the end of the time; all the grain, corn, straw, grass, hay, and all other crops, to belong to him. The wheat in controversy was part of that raised under this arrangement, and had not been separated and set apart as the property of the Linnemann's when it was levied upon and taken by defendant, sheriff of the county, under execution against them.

It is clear that the contract is just what it purports to be, a contract of hiring, and the exclusive property in the crops was in plaintiff until he should set apart for the Linnemanns the amount they might be entitled to in payment of the balance due them at the end of the time specified. The several requests of defendant for instructions to the jury were all based on a wrong theory of this contract, the first assuming it to be a chattel mortgage, and the second and third that it constituted the Linnemanns part-owners in the wheat. The requests were all properly refused.

[Omitting minor matters.]

Order affirmed.

* See *Reynolds v. Pool* (84 N. C. 37), 37 Am. Rep. 637, and note, 603.

Boetcher v. Staples.

BOETCHER V. STAPLES.

(57 Minn. 308.)

ages — exemplary — act punishable as crime.

Exemplary damages are recoverable in an action of assault and battery, although the act is also punishable as a crime. (*See note.*)

ACTION of assault and battery. The opinion states the point. The plaintiff had judgment below.

J. N. & I. W. Castle, for appellant.

McCluer & Marsh, for respondent.

GILFILLAN, C. J. It is fully settled by the decisions of this court that in actions for torts, where there has been fraud, malice or oppression on the part of the defendant, the jury may allow what are denominated exemplary or punitive damages — that is, damages beyond the mere pecuniary loss or injury to the plaintiff, and intended as in some measure a punishment upon the defendant for the wrong done, and as an example to deter others from similar acts. *Lynd v. Picket*, 7 Minn. 184; *Fox v. Stevens*, 13 id. 272; *Seaman v. Feeney*, 19 id. 79; *McCarthy v. Niskern*, 22 id. 90.

The rule, according to the great mass of authorities, applied as well where the wrongful acts of the defendant bring him within the law for punishing crimes, as where they are less aggravated in their character. The rule is so well established that whatever may be the abstract reasons for or against it, it must be adhered to till changed by the legislature.

Order affirmed.

NOTE BY THE REPORTER.—In *Flanagan v. Womack*, 54 Tex. 45, it was held that in an action of assault and battery evidence of the payment of a fine in a criminal prosecution for the same matter is admissible in mitigation of damages, but not in bar of exemplary damages. *BOWMER, J.*, expressing the opinion of himself and *GOULD, J.*, said that if the question were an open one he should hold the contrary. He observed further: "The only consistent theory upon which the judgment in the criminal prosecution can be admitted in mitigation of damages in the civil action is, that by a fiction of the law, the plaintiff in the latter represents the public, and that to this extent the two suits are considered as between the same parties, and that the fine in the one should decrease the amount of the judgment in the other — a fiction which, as above shown, may work a great hardship on the

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plaintiff. This testimony is admitted solely for the benefit of the defendant, not the public, and it is not perceived on principle, if such evidence can be admitted in mitigation, why it should not also be admitted in bar; or why it would not logically follow, that if the defendant had been acquitted instead of having been convicted, he could not plead this former acquittal in bar; or as the rights of the parties should be mutual, why, if the civil suit had been first tried and judgment rendered against the defendant, this should not be a mitigation or bar to the criminal prosecution. That such should be the rule in mitigation, if not in bar, in those tribunals where the injured party, as private prosecutor, receives part of the fine, would seem proper: but to permit it in this State, where the fine is paid to the government and not to the prosecutor, would in many cases virtually supersede the criminal law. Thus considered, the testimony of the former conviction and fine would not have been admissible. *Hoadley v. Watson*, 45 Vt. 289 (1873); S. C., 12 Am. Rep. 197; *Reed v. Kelly*, 4 Bibb, 400; *Wheatly v. Thorn*, 28 Miss. 63; *Phillip v. Kelly*, 29 Ala. 633; *Cook v. Ellis*, 6 Hill, 486; Field on Dam., §§ 73-8; § 91, and authorities cited in notes; *Fay v. Parker*, 53 N. H. 342; S. C., 16 Am. Rep. 270. Whatever may be my individual opinion, however, I feel constrained, from a long and uniform course of decisions on this subject in this State, and for this reason only, to concur with the other members of the court in the opinion that the court below did not err in overruling the demurrer and admitting the evidence." Moore, C. J. dissented.

CITY OF ST. PAUL V. SMITH.

(27 Minn. 364.)

Municipal corporation—ordinance—hackmen.

A city ordinance putting hackmen at railway stations under the commands of the police there, and enacting that they shall take positions there assigned them by the police, is warranted by a charter authority to regulate hacks, and is reasonable, although the places in question are not the property of the city.*

CONVICTION for violation of an ordinance. The opinion states the case.

W. P. Murray, for plaintiff.

S. L. Pierce, for defendant.

BERRY, J. Subdivision 11, subchapter 4, of the city charter of St. Paul (Sp. Laws 1874, c. 1), authorizes the common council, by ordinances, resolutions, or by-laws, "to regulate, and at a reasonable rate to license, hacks, carts, omnibuses, trucks, wagons, and other vehicles engaged in hauling or carrying for hire, and the

* See note, 35 Am. Rep. 702.

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charges of the drivers of such vehicles." Under this authority the common council passed two ordinances, Nos. 107 and 133. No. 107 provides "that hackmen, * * * when at or about any railroad depot or station, * * * shall obey the command and directions of the police officer or officers who may be stationed or doing duty at or about such depot or station * * * for the preservation of order, and enforcement of ordinances." No. 133 provides that "no owner or driver of any * * * hack * * * shall make any stand or stopping-place, with or without his vehicle, while waiting for employment at any place on any street or public ground adjacent to any railroad or railway depot, * * * except in the place or places designated by the police officer on duty, from time to time, at such railway depot or station." These provisions of the ordinances named were, in our opinion, authorized by the charter provision above quoted, giving authority, among other things, to regulate hacks. That they are *regulations* of hacks is apparent, and in our opinion they are not unreasonable or oppressive. It is a matter of common knowledge that at and about the hours of the arrival and departure of passenger trains, confusion and disorderly brawling and breaches of the peace are very apt to occur at and about depots and stations in considerable towns, especially among those who are engaged in carrying passengers and baggage to and from such depots and stations. The only efficient preventive or remedy in the premises appears to be to put a police officer upon the spot, whose duty it shall be to enforce such applicable ordinances as the city council, in the exercise of chartered power, may have seen fit to adopt. This seems to be the general if not universal practice in all large cities and towns. As it is manifestly impracticable and impossible to define minutely every case of disorder or confusion, it is proper — in fact, it is necessary — that the officer on duty should be invested with some general authority to preserve order, and thus determine on the emergency what acts are disorderly or likely to lead to disorder, though of course this authority would not justify him in arbitrary or unreasonable action. Upon these grounds we think the ordinances in question valid and justifiable. The assigning of a particular place to each hackman would appear to be peculiarly and happily adapted to the preservation of order. By this practice every one is informed exactly where his proper place is, so that the strife and contention for particular places which would otherwise ensue is measurably, at any rate, pre-

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vented. The authority thus to assign places must necessarily be committed to some officer, and for obvious reasons it is very properly committed to the policeman on duty at the depot or station. As in the other case mentioned, this authority should, of course, be exercised with fairness to all concerned. The fact that the ground about the depots or stations where these ordinances are to be enforced is not the property of the city, or public property of any kind, strictly speaking, is not important. The fact that it is commonly used by hackmen in their business, for the purposes mentioned in the ordinances, is sufficient.

Judgment affirmed.

 COUNTY OF HENNEPIN V. BROTHERHOOD OF GETHSEMANE.

(27 Minn. 460.)

Statute — construction — public charity — hospital.

A hospital, with the necessary grounds, free to all who are not pecuniarily able, and supported partly by private contributions and partly by fees from patients, but producing no profit, is a purely "public charity." (*See note, p. 800.*)

ACTION for taxes. The opinion states the case. The defendant had judgment below.

W. E. Hale, for plaintiff.

George R. Robinson, for defendant.

BERRY, J. The facts found by the District Court are these: The defendant is, and for several years last past has been, a corporation under the laws of this State, and as such, owner of lots 8 and 9, in block 212, in Nelson's addition to Minneapolis. Defendant is also owner of lot 10, in the same block, upon which is situated a building in which defendant has, for several years last past, maintained a hospital for the care of such as need the benefits of such an institution. This is known as the Cottage Hospital, and the public generally are entitled to enjoy its benefits, without regard to sex, race, or religious belief. Those who are cared for in

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the hospital, if pecuniarily able, are charged from two to six dollars per week, according to their ability. Such as are not able to pay are cared for without charge. Hennepin county is charged, for the care of such patients as are a legal county charge, six dollars per week. All income received from private and county patients is devoted to the maintenance of the hospital; and besides, private contributions are necessary, and are bestowed, to maintain the same. Lots 8 and 9, above mentioned, which adjoin lot 10, and are in the same inclosure with it, are used as a vegetable garden, wood-yard, etc., for the use and convenience of the hospital. No part of them is leased or otherwise used with a view to profit.

Upon these facts the District Court held, as matter of law, that lots 8 and 9 were exempt from taxation. We think this was right. Section 3, art. 9, of the Constitution, declares that "public burying-grounds, public school-houses, public hospitals, academies, colleges, universities, and all seminaries of learning, all churches, church property used for religious purposes, and houses of worship, institutions of purely public charity, public property used exclusively for any public purpose, * * * shall, by general laws, be exempt from taxation." Gen. Stat. 1878, ch. 11, § 5, provides that "all buildings belonging to institutions of purely public charity, including public hospitals, together with the land actually occupied by such institutions, not leased or otherwise used with a view to profit," shall be exempt from taxation. Whether the Cottage Hospital is a "public hospital," within the meaning of the Constitution, and therefore a proper subject of exemption by statute, we do not deem it necessary at this time to inquire. We have no doubt that it is an institution of purely public charity.

In legal parlance the word "charity" has a much wider signification than in common speech. But without undertaking to give a general definition, it will be sufficient for all the purposes of this case to say that an institution established, maintained and operated for the purpose of taking care of the sick, without any profit, or view to profit, but at a loss which has to be made up by benevolent contribution, is a charity. If in addition to this the institution is one the benefits of which the public generally are entitled to enjoy, it is then a purely public charity — public, because, although not owned by the public, its uses and objects are public; purely public, because its uses and objects are wholly public, and for the benefit of the public generally, and in no sense private as being

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limited to particular individuals. The word "public" has two proper meanings. A thing may be said to be public when owned by the public, and also when its uses are public. The Cottage Hospital falls within this description of an institution of purely public charity. That patients who are able to pay are charged for hospital services according to their ability, and that the county pays for such services rendered to those who are a legal county charge, are facts of no importance upon the question as to the character of the institution as one of purely public charity; for the fact still remains, that notwithstanding all receipts from such sources, the hospital is established, maintained and conducted without profit or a view to profit, and that on the whole it is operated at a loss which is necessarily made up by private contributions.

Lots 8 and 9 are not occupied by the hospital building; they might be disposed of, and the hospital still remain. But they are used, and used directly and solely, for the purposes of the hospital, as a wood-yard and vegetable garden. In our opinion they may properly be regarded as a part of the "institution." That term comprehends not only a building, and the ground covered by it, but adjacent ground which is reasonably necessary or appropriate to the purposes and objects in view, and which is used directly for the promotion and accomplishment of the same. If these were leased, and were sought to be exempted because the rents were applied to the payment of the expenses of the institution, a question would be presented which we are not now called upon to answer. In our opinion these lots 8 and 9 are exempt from taxation, and they were therefore improperly assessed and taxed. The order of the District Court directing judgment setting aside the tax assessed thereon is accordingly affirmed.

Judgment accordingly.

NOTE BY THE REPORTER.—See *McDonald v. Mass. Gen. Hospital*, 120 Mass. 433; s. c., 21 Am. Rep. 529; *Clement v. Hyde*, 50 Vt. 716; s. c., 23 Am. Rep. 523; *Wards v. Manchester*, 56 N. H. 508; s. c., 22 Am. Rep. 504. In *Burd Orphan Asylum v. School District of Upper Darby*, 90 Penn. St. 21, it was held that an institution for the support and education of the orphan children of a distinct denomination of Christians was not such a "purely public charity" as to be exempt from taxation, within the spirit of the Constitution. TRUNKY, J., delivered the opinion, and SHARSWOOD, C. J., and MENCOR and PAXON, JJ., dissented. But a reargument was granted and the court decided the converse, *id.* The exact decision is as follows: "A 'purely public charity' within the meaning of the Constitution of Pennsylvania may be one in which the designated beneficiaries are to be all of one particular religious faith, provided that the persons to be benefited are indefinite within the specified class. The fact that the beneficiaries were to be of a particular religious faith did not make the institution any less a 'purely public charity.' At any

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rate the persons of the third class were in legal contemplation beneficiaries upon the same title and with the same abstract rights as those of the first and second classes; and therefore the institution must be held to be open to the general public." GORDON, TRUNKY, and STRANGETT, JJ., dissented. On the first hearing the court said: "The clear and convincing opinion of the learned judge of the Common Pleas comprises all that need be said in support of the judgment. He puts the case on the true ground, namely, that the charity is not purely public, for the reason that it is practically limited to white female orphan children, who shall have been baptised in the Protestant Episcopal Church. His reasoning upon the essential point, accords with the doctrine of *Donohugh's Appeal*, 85 Penn. St. 306, where it was held that private institutions for purposes of purely public charity, and not administered for private gain, may be exempted from taxation. It was there said, 'The essential feature of a public use is that it is not confined to privileged individuals, but is open to the indefinite public. It is this *indefinite* or unrestricted quality that gives it its public character. The smallest street in the smallest village is a public highway of the Commonwealth, and none the less so because a vast majority of the citizens will certainly never derive any benefit from its use. It is enough that they may do so if they choose. So there is no charity conceivable which will not, in its practical operation, exclude a large part of mankind, and there are few which do not do so in express terms, or by the restrictive force of the description of the persons for whose benefit they are intended. Thus [Girard College excludes by a single word half the public, by requiring that only *male* children shall be received; the great Pennsylvania Hospital closes its gates to all but *recent* injuries, yet no one questions that they are public charities in the widest and most exacting sense. * * * Next, and last, we have to consider the force to be given to the word 'purely' in the constitutional phrase, 'purely public charity.' In this connection, and in its ordinary sense, the word purely means completely, entirely, unqualifiedly, and this is the meaning we must presume the people to have intended in adopting it in their constitution.' Per MITCHELL, J., in *Common Pleas*

"From the foregoing, it is at once seen that a public use, whether for all men or a class, is one not confined to privileged persons. The smallest street is public, for all have an equal right to travel on it; but a way used by thousands, which may be shut against a stranger is private. Would Girard College be a public charity if the male children entitled to admission were limited to sons of deceased Masons or Odd Fellows? If Pennsylvania Hospital closed its gates to all but Methodists or Baptists, having recent injuries, the people would not believe it a purely public charity in the intentment of their constitution. A charity for the poor of a parish or township is public; but not, if confined to poor Presbyterians in the municipality.

"Public charities may be restricted to a class of the people of the State or of a municipal division; at the same time, they must be general for all of the class, within the particular municipality. 'Thus a blind asylum is only for the blind in the community.' If it be completely public, all the blind in that community are on an equal footing, and should its capacity be insufficient for all, there is no mistaking justice in the order of admission. To open its doors only to the blind of a particular religious denomination, or of a beneficial association, or of a political party, shuts them against the public. As known and recognized class, though not generally poor, or diseased or decrepit, may be the subject of a public charity, as sailors; yet if the endowment were limited in its benefit to sailors who are members of a designated sect, there could hardly be two opinions of its character.

"Private or individual gain in a pecuniary sense is not the sole test. 'The true test is to be found in the objects of the institution.' Where these are to advance the interests of a party, of an association, of a private corporation, of a religious denomination, and the like, however beneficial to the public their growth and success may be, there is a private object to gain; the institution is not unqualifiedly public. In such cases the purpose is wholly private, or the private blends with the public."

On the last hearing the court said: "It is conceded that the devise in question has created a charity which is public in the strict sense of that expression. But it is urged, that it is not *purely* public, and hence that to apply the language of the act to this particular case, would be a violation of the constitutional provision. Now it must be conceded and it has been decided here and elsewhere, that the word 'purely' is

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not to have its largest and broadest significance when used in this connection. In the opposing line of thought it is admitted that the word is to have a limited meaning. It is not contended that a charity to be purely public must be open to the whole public, nor to any considerable portion of the public. Without doubt an asylum for the support of fifty blind men or an equal number of paupers would not be obnoxious to the objection that it was not 'purely public.' A charity for the maintenance of disabled seamen, or of aged and infirm stone masons, resident in the city of Philadelphia, would undoubtedly be a purely public charity. And so also would a charity for the education and maintenance of the children of such persons. And if such a charity should be limited to the white female orphan children of such persons between the ages of four and eight years, such limitations though they would very greatly restrict the class and the number of the beneficiaries, would constitute no valid objection to the purely public character of the charity. But seamen and stone masons are only designated classes of persons distinguished by their occupations. A charity for the support of poor widows, or indigent old men, or the insane poor, of a city, county, borough, or township would be equally a purely public charity, no matter how small would be the number of the beneficiaries or how limited the class.

"Why then would not a charity for the support of poor Episcopalians, Catholics, Jews or Presbyterians of a State or city, be purely public; or a charity for the education and maintenance of the orphan children of such persons? No private gain or profit is sub-served; the objects of such a charity are certain and definite, and the persons benefited are indefinite within the specified class. The circumstance that the beneficiaries are to be of a particular religious faith is only of importance as designating the class. It indicates a certain portion of the whole community who are to be recipients of the charity. It has the same effect in this respect as the words seamen, stone masons, blind persons, poor widows, etc., in the cases already mentioned. For the purpose of defining the class of persons, who, as distinguished from all other persons in the community, are to enjoy the benefit of the donor's bounty, the legal effect is the same, whether the words used be seamen, Episcopalians, blind persons, Catholics, poor widows, Jews, stone masons or Presbyterians. The argument that to sustain, as purely public, a charity in favor of persons of a particular religious faith, would be to maintain sectarianism, is of no weight. It is not discrimination in favor of a sect, for it is treating all sects alike. It is not even extending a preference to sectarians; it is merely recognizing them as a class of persons. We see no reason why that community which ranges persons into classes, so far as this subject is concerned, may not be a community of religious faith, as well as of occupation, condition in life, sex, color, age, disability, physical or mental, or nationality. As to the meaning of the word 'purely,' when used in this connection, we concur in the construction which was given by the Supreme Court of Ohio in the case of *Gerke v. Purcell*, 25 Ohio St. 229, that 'when the charity is public, the exclusion of all idea of private gain or profit is equivalent in effect to the force of 'purely,' as applied to public charity in the Constitution.

"But there is another and a broader ground upon which this particular charity must be sustained as purely public. It is this: the third class of persons enumerated in the will of the testatrix as the objects of her bounty are 'all other white female orphan children of legitimate birth, not less than four years of age, and of not more than eight years, without respect to any other description or qualification whatever, except that at all times and in every case the orphan children of clergymen of the Protestant Episcopal Church shall have the preference.' It will of course not be disputed that if this were the only class of beneficiaries mentioned in the will, the charity would be purely public in the strictest sense.

"Does the circumstance that two other classes are first named take away that character, and if so, how? The learned judge of the court below stated and answered this question by saying that 'the exclusion of the general public is so great as to amount to almost absolute rejection.' This position makes the legal character of the charity to depend upon a question of fact. The argument assumes, for the purpose of testing the quality of the charity as being 'purely public,' that the orphan children of the general public cannot be admitted (because they are in point of fact excluded by the numbers of persons to be admitted) in the first and second classes. Now in legal contemplation the persons of the third class are beneficiaries upon the same title, and with the same abstract rights as those

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of the first and second. In any case of application for admission by one of the third class, it would be no answer to say that there were other orphan children in the city or State who were of the Episcopal baptism, and had the other qualifications, and therefore the applicant could not be admitted. If there were actual vacancies in the asylum for more pupils, and no applications from persons of the first or second class, undoubtedly the applicant would be entitled to admission. And further, when once admitted, such pupils would not be liable to be ejected in order to make room for subsequent applicants of the first or second class.

"In other words, in such a case the only adequate reply that could be made to an applicant of the third class would be, that at the time of the application the asylum was already full. But that reply would be good in any case of a purely public charity. Hence, the only barrier to admission would be one that is common to all the classes and peculiar to none. How then can it be said that it is not purely public charity because it is not open to the general public? In law it is open to them, and hence, by a court defining its legal meaning, it must be held to be purely public."

Counsel in this case contended "that the constitutional provision was intended to exclude—1. Charities not public, as a gift to the donor's 'poor relations.' *Attorney-General v. Bucknall*, 2 Atk. 328. 2. Charities founded with a view to profit. 3. Charities which, though free from private profit, were for organizations not in themselves legal charities, as Masonic orders, dramatic associations, beneficial societies, etc. *Swift v. Easton Society*, 73 Penn. St. 322. 4. Institutions connected with public charities, but not used for the purposes of charity, as parsonages, real estate producing rental, etc. *Mullen v. Commissioners*, 35 id. 239; s. c., 27 Am. Rep. 650; *Christian Association v. Donohugh*, 7 W. N. C. 208; *New Orleans v. St. Patrick Association*, 28 La. Ann. 512. But it was not intended to exclude public educational charities, neither founded nor conducted for profit, and in actual use for the purposes of their organization. It was not intended to apply to an exemption which treats all sects alike."

In *Philadelphia v. Fox*, 64 Penn. St. 160, the trusts under Girard's will to the city were held to be for public charity. The court described them in the following passage: "The trusts held by the city of Philadelphia, which are enumerated in the bill before us, are germane to its objects. They are charities, and all charities are in some sense public. If a trust is for any particular persons, it is not a charity. Indefiniteness is of its essence. The objects to be benefited are strangers to the donor or testator. The widening and improvement of streets and avenues, planting them with ornamental and shade trees, the education of orphans, the building of school-houses, the assistance and encouragement of young mechanics, rewarding ingenuity in the useful arts, the establishment and support of hospitals, the distribution of soup, bread or fuel to the necessitous, are objects within the general scope and purposes of the municipality."

In *Donohugh's Appeal*, 86 Penn. St. 308, the Library Company of Philadelphia permits the use of its library: 1. By all persons within the library building, free of charge or fee of any kind. 2. By all persons who desire to take out books for a small hire and leave a deposit as security therefor. 3. By members who pay an annual fee for the privilege of taking out books. These members have the further privilege of voting for the managers, and are nominally the owners of the library. No dividends are paid, but the entire income is dedicated to the expenses and purchase of books. Held, that such an institution is a purely public charity within the meaning of the Constitution.

In *Gerke v. Purcell*, 25 Ohio St. 220, a Roman Catholic parochial school, not carried on for profit, but to which parents who were able were required to make small contributions, was held a "purely public charity." So of "an asylum for destitute men and women, and the incurable sick and blind, irrespective of their nationality or creed." *Humphries v. Little Sisters of the Poor*, 29 Ohio St. 201.

So of a "Home for Friendless Women," designed to "protect unprotected women, house the houseless, save the erring, and keep the tempted." *City of Indianapolis v. Indianapolis Home for Friendless Women*."

See also, *Vidal v. Girard's Ex'rs*, 2 How. 128; *President of the United States v. Drummond*, 7 H. L. C. 141, n.; *Trustees of the British Museum v. White*, 2 Sim. & Stu. 565; *Jones v. Williams*, 2 Amb. 652; *Jackson v. Phillips*, 14 Allen, 539; *American Academy of Fine Arts and Science v. Harvard College*, 12 Gray, 568.

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(27 Minn. 466.)

Election — ineligibility — candidate receiving less than plurality of votes.

Where an ineligible candidate for a public office receives a plurality of votes, the next highest candidate is not entitled to the office, if the ineligibility does not appear on the ballots.

PETITION for writ of *quo warranto*. The opinion states the case. The respondent had judgment below.

H. F. Masterson and Seagrave Smith, for petitioner.

C. K. Davis, for respondent.

CORNELL, J. The question of granting leave to the relator, without the consent of the attorney-general, to file an information for a *quo warranto* against the defendant, to inquire into and determine his right to the office of lieutenant-governor, which he now holds, is presented upon the admissions and averments of his answer to the petition and order to show cause, taking them to be true. If upon the showing thus made, the relator is not entitled to the office under any circumstances, he clearly has no interest in any question properly triable by means of the writ, and his application should be denied on that ground alone, irrespective of any other question or consideration.

At the State election in November, 1879, the relator and respondent were both candidates for the office of lieutenant-governor, for the term commencing January 1, 1880, having been put in nomination and supported as such by their respective parties. The result of the official canvass, the correctness of which is admitted, showed that of all the votes cast for that office the respondent received a decided majority, and some 20,000 more than the relator, who was the next highest candidate. Thereupon the respondent was duly declared elected, and given a certificate of election, and he subsequently qualified as such officer.

At the time of his nomination he was holding the office of a representative in the legislature from the first representative district in the county of Stearns, under an election for a term extending to

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January 1, 1881; but prior to the said State election he resigned that office, and his resignation was duly accepted. In the convention that nominated him, the fact of his being a representative was made known, and the question of his eligibility was discussed with the result already stated. The discussion was continued during the subsequent canvass, in the newspapers and at various public meetings held in different parts of the State, his eligibility being insisted upon by his friends and supporters, and denied by his opponents. Upon this state of facts relator claims that the respondent was ineligible to the office, under article 4, section 9, of the Constitution, which provides that "no senator or representative shall, during the time for which he is elected, hold any office under the authority of the United States, of the State of Minnesota, except that of postmaster," and that the fact of his ineligibility was of such general notoriety as to be presumably within the knowledge of the whole body of electors, so that all votes cast for him must be treated as nullities, although not declared to be void by any express provision of law.

[Omitting an *obiter* discussion.]

Conceding however the incorrectness of these views as to the construction of the constitutional provision in question, and that the respondent was in fact legally ineligible to the office of lieutenant-governor, it is certain that his right to hold the office cannot be tested upon the information of the relator alone, without the consent of the attorney-general, unless he shows himself entitled to the office by reason of his having received the next highest number of votes to those cast for his ineligible competitor. The relator's right to the office depends upon the legal effect of the votes which the respondent received, assuming him to have been ineligible by reason of the alleged fact that his term of office as representative had not then expired, notwithstanding his resignation, the contention on the part of the relator being that they were absolute nullities, and therefore not to be counted or considered in determining the result of the election.

The authorities of both the English and American courts agree that the ineligibility of a candidate who has received the highest number of votes for an office will not, in the absence of any statute declaring them to be void, work the result of giving the election to the next highest candidate, when the voters for the former had no prior actual knowledge of the disqualifying fact,

together with such other information as would raise a reasonable inference that they also knew that the fact amounted in law to a disqualification rendering the person voted for ineligible. *Queen v. Mayor*, 3 Q. B. 629, and cases cited *infra*.

In a well-considered case recently decided in New York, *People v. Clute*, 50 N. Y. 451; s. c., 10 Am. Rep. 508, the rule which requires a vote to be treated as of no effect, in case the person receiving it is ineligible, is thus stated by the court (page 466): "The existence of the fact which disqualifies, and of the law which makes that fact operate to disqualify, must be brought home so closely and so clearly to the knowledge or notice of the elector as that to give his vote therewith indicates an intent to waste it. The knowledge must be such, or the notice brought so home, as to imply a willfulness in acting when action is in opposition to the natural impulse to save the vote and make it effectual. He must act so in defiance of both the law and the fact, and so in opposition to his own better knowledge, that he has no right to complain of the loss of his franchise, the exercise of which he has wantonly misapplied." The case arose under a public statute, which prohibited the election to an office of superintendent of the poor, in a county, of any supervisor of a town or ward in a city of such county, and the points decided were that Clute, who was a supervisor of a ward in the city of Schenectady, was ineligible to an election to the office of superintendent of the poor, and therefore not entitled thereto, though receiving the highest number of votes therefor, but that the electors of such ward were not chargeable, upon any presumptions of law or fact, with any notice or knowledge of the fact that he was such supervisor, or of the existence or operative effect of the public statute which made that fact a disqualifying one, so as to nullify the votes which were given to him in that ward, and thereby give the office to his competitor, who, but for such votes, received the requisite number to entitle him to an election. If the case at bar is to be decided upon the doctrine of that case, clearly the relator has no right to the office of lieutenant governor, though Mr. Gilman may have no legal right to hold it.

In *Gulick v. New*, 14 Ind. 93, subsequently followed by the same court in *Carson v. McPhetridge*, 15 id. 327; *Price v. Baker*, 41 id. 572; s. c., 13 Am. Rep. 346, while conceding the rule to be that ineligibility from a cause unknown to the voters, such as infancy or want of naturalization, will only operate to defeat the election of

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the person affected by it, it was held, in case the ineligibility arises out of holding a public office which is made a cause of disqualification by some public law, that the electors within the territorial limits of the jurisdiction of such officer are chargeable with notice as to who is the incumbent of the office, and also that the statute disqualifies him from being elected to any other, so that any votes cast by them in his favor therefore will be treated as nullities. The doctrine of these cases is disapproved in that of *People v. Clute*, above cited, and is undoubtedly against the general current of judicial opinion and authority in this country, which upholds, as more in harmony with the spirit of our institutions, the rule that a majority of the votes cast for an ineligible candidate at a popular election, in the absence of any statute declaring them void, while conferring no right to the office, are still so far effectual as to prevent a minority candidate being elected. *Com. v. Cluley*, 56 Penn. St. 270; *Saunders v. Haynes*, 13 Cal. 145; *Crawford v. Dunbar*, 52 id. 36; *State v. Gilos*, 1 Chand. (Wis.) 112; s. c., 2 Pinney, 166; *State v. Smith*, 14 Wis. 497; *State v. Swoearingen*, 12 Ga. 23; *People v. Molitor*, 23 Mich. 241; *State v. Gastinel*, 20 La. Ann. 114; *Fish v. Collens*, 21 id. 289; Opinion of Judges, 38 Me. 598; *Sublett v. Bedweil*, 47 Miss. 266; s. c., 13 Am. Rep. 338; *In re Corliss*, 11 R. L. 638; s. c., 23 Am. Rep. 538. Cooley on Const. Lim. 620; 1 Dill. Mun. Corp., § 135.

In this State the question as yet is an open one, so that the point for adjudication upon the facts in the case at bar may and ought to be ruled upon reason and principle, having reference to our own laws and the policy they indicate. Our statute regulating elections (Gen. St. 1878, ch. 1, § 48) enacts "that in all the elections, unless it is otherwise expressly provided, the person having the highest number of votes for any office shall be deemed and declared to be elected." The plain purpose of this provision is to secure in places of public trust representatives of the popular will, chosen by a plurality of the qualified electors who may see fit to exercise the right of voting in the manner provided by law. Under it no one can be deemed the choice of the electoral body, or elected to any office, who has not received a plurality of the legal votes cast by that body. The statute prescribes the manner in which every elector shall exercise his right of voting, which shall be by a secret ballot, the form and character of which is prescribed. Gen. St. 1878, ch. 1, § 14. It must be "a paper ticket containing, written

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or printed, or partly written and partly printed, the names of the persons for whom the elector intends to vote, and designating the office to which each person so named is intended by him to be chosen," and every ballot having a greater number of names for any one office than the number of persons required to fill the same, is declared to be void to that extent, but no further. *Id.*, §§ 14 and 19.

For the purpose of determining the choice of the electors, no provision is made for any inquiry into their motives and intentions, or their means of knowledge concerning the qualifications of the persons voted for, other than what is furnished by the ballots themselves. That none such was intended to be allowed is evident from the nature and character of the secret ballot, which is guaranteed to every voter as an inviolable right by the Constitution, for that precludes the possibility of identifying his vote, and prevents any effective investigation, outside the ballot itself, concerning the intention with which it was cast, or the knowledge which was had by the one who gave it. Every ballot therefore cast at any election, which substantially conforms to all the requirements of the statute, and which does not disclose upon its face any fact making it void, such as ineligibility to an election of the person voted for, from which, possibly, a knowledge of that fact on the part of the voter might be inferred, and a presumption raised of an intention to waste his vote, must be taken as a valid and *bona fide* expression of the voter's choice in favor of the person therein named for the office designated, and cannot be treated as a nullity. It cannot be presumed, in opposition to the declared purpose of the vote itself, that it was cast in bad faith, and with no intention to make it effectual, as might perhaps be the case with one voting with actual knowledge that the person voted for was in fact and in law ineligible to an election. To allow such a presumption to nullify more than half the votes given at a State election, as we are called upon to do in this case, would be doing violence to the fundamental principle of a popular government, which, in recognizing the fitness and capacity of the people for self-government, necessarily implies that the right of suffrage will be exercised in good faith, and in accordance with the best judgment and information of the electors.

Conceding therefore the respondent's ineligibility as claimed, it better accords with the policy of our election laws and the spirit of

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our political institutions to hold that those who voted for him acted from want of knowledge, or some misapprehension of law or fact affecting his eligibility, whereby the election has proved a failure, than to attribute to them such a wanton abuse of the elective franchise as would be implied in knowingly wasting their suffrages upon one disqualified from receiving them, and thereby give to the relator an election which is evidently not the result of the deliberate choice of the electoral body. As further bearing upon the question under consideration, it is to be noted that the framers of the Constitution, in creating this qualification mentioned in section 9 of art. 4 of that instrument, made no provision for nullifying such votes as might be cast for a person resting under such disqualification; while in creating, in nearly identical language, a like disability in respect to justices of the Supreme Court and District judges, (art. 6 § 11), they expressly provided that "all votes for either of them for any elective office under this Constitution, except a judicial office, given by the legislature or the people, during their continuance in office, shall be void." The implication is strong, if not conclusive, that the rule thus expressly adopted in the latter case was not intended to be applied in any case arising under the provisions of the former section.

It results from these views that the relator is in no position to question the legal right of respondent to hold the office of lieutenant-governor, and his application must be denied.

CASES
IN THE
SUPREME COURT
OF
MISSISSIPPI

BUSH V. FOOTE.

(38 Miss. 5.)

Negotiable instrument — bill of exchange — equitable assignment.

A bill of exchange, payable generally, is not an equitable assignment of funds in the drawee's hands; and although the drawee owes the drawer more than the amount of the bill, and refuses to accept or pay the bill, and afterward pays the funds to the drawer, he is not liable to the payee.*

BILL to restrain an action at law on checks. The defense in that action was that the funds drawn against by the checks had previously been equitably assigned by the defendant by a bill of exchange drawn generally, in their favor by the same party, but which the drawee, plaintiff in that action, had refused to accept or pay. The injunction was denied below.

Jarnagin, Boyle, & Jarnagin, for appellants.

Orr & Sims, for appellee.

CAMPBELL, J. This court is committed to the doctrine that a valid equitable assignment may be made of part of a debt, regardless of the assent or wishes of the debtor (*Hutchinson v. Simon*, 57

* To same effect, *First Nat. Bk. of Canton v. Dubuque Southwestern Ry. Co.* (22 Iowa, 378), 35 Am. Rep. 230; *Jones v. Pacific Wood, Lumber and Flume Co.* (12 Nev. 350), 20 Am. Rep. 308.

Miss. 628), and that any thing which clearly manifests the intention of the creditor to make a specific appropriation of a particular thing to a particular purpose, and a willingness on the part of the transferee to accept such appropriation, may take effect as an equitable assignment. *Pass v. McRae*, 36 Miss. 143.

It is well settled that an order drawn on a particular fund is operative as an assignment of the fund, and will make the drawee equitably answerable to the payee for a failure to comply with the order; and it is equally well settled by the great weight of authority in England and America that "a bill or draft payable generally, and not specifying or referring to any particular fund, does not operate as an equitable assignment." 2 White & Tudor Ld. Cas., pt. 2, p. 1650, and cases cited in the comments on the leading case, *Ryall v. Rowles*.

The distinction is between an order and a bill of exchange. An order payable out of a designated fund is a specific appropriation of that fund, and vests in the payee a right to the particular thing thus appropriated, which will be made effective, as against the thing, by treating the person on whom the order is drawn as a holder of what is so specifically appropriated for him in whom it has been vested by the order.

A bill of exchange confers no such rights and has no such effect. It is payable generally, absolutely, and at all events. It does not appropriate any particular thing to the payee. The idea of a transfer or assignment to the payee of an interest in a particular fund does not obtain in reference to a bill of exchange. It has a distinctive character, and is attended by certain legal incidents. If accepted by the drawee, he is bound by virtue of his acceptance, and not upon the ground of an assignment of so much money in his hands belonging to the drawer. An order operates as an assignment without acceptance by the drawee. A bill of exchange does not operate as an assignment, even after it has been accepted.

We have carefully considered all the cases and text-books cited by counsel in this case, and many others, and among them all not one, as we think, maintains the case made by the bill of complaint. The case of *Corser v. Craig*, 1 Wash. C. Ct. 424, was not a contract between the payee and the drawee, and Judge WASHINGTON expressly said that no mischief could result from holding a bill of exchange to be a transfer of the money drawn for; because, if the drawee, after refusal to accept, should afterward pay the money to

the drawer, the payee not having notified him that he would hold him responsible for the money drawn for as having been assigned, the payment would discharge the drawee. So that according to the opinion of the court in that case, the bill of exchange would operate as an assignment of the money in the hands of the drawee, or not, as the payee might give notice to the drawee that he considered it an assignment and would hold him responsible accordingly, or should fail to do this. In other words, whether a bill of exchange is an assignment, or not, depends on whether the payee so considers and claims. If this strange doctrine could be sanctioned, it would not maintain the case of complainant here; for instead of claiming the bill of exchange as an assignment, and notifying the drawee that he would be held answerable for the sum of money drawn for as having been assigned to them, the complainants, when the drawee refused to accept the bill, instead of asserting any right, solicited from the drawee a promise to notify them when he went to make a settlement with the drawer of the bill, so that they might protect their rights against him, and contented themselves with the silence of the drawee as to this request, and the inference they drew that he would comply with it; and a part of the complaint against the drawee is, that he did not notify complainants of the settlement he was about to make with the drawer, so that they might intercept the money in the hands of the drawee. This part of the bill is inconsistent with the alleged assignment; for if the bill of exchange was an assignment of its amount, the right of complainants as payees was secure against the drawee having notice of it, and they had no need of notice of any settlement between the drawee and drawer, which could not affect them injuriously.

The case of *Wheatley v. Strobe*, 12 Cal. 92, differs from the case at bar in the fact that the drawee had assented to the appropriation by verbally accepting the bill and promising to pay it. It is true that the court held that he was not bound by this acceptance, because a statute required it to be in writing, and the decision was based on the proposition that a bill of exchange is an assignment of the money drawn for, as regards the drawee, even though he refuses to accept it; but it is not probable, that in the face of a statute requiring acceptance to be in writing, the court would have held the drawee bound as though he had accepted in writing, but for his assent to the assignment. The effect of the decision is to

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make acceptance unnecessary in any case where the drawee is in funds, and to make a bill of exchange in itself an assignment of its amount — a doctrine unsustained by authority and condemned by an imposing array of authorities. It may be justly remarked that the cases cited in the opinion referred to, except that in 1 Wash. C. Ct., were upon orders on designated funds, and therefore do not sustain that opinion, which wholly fails to advert to the obvious difference between orders and bills of exchange, and thus confounds totally distinct things. We cannot accept it as a correct exposition of the law.

After diligent search for a case in which the drawee who refused to accept the bill of exchange, or in any way to recognize any obligation as imposed on him by it, and who afterward paid his indebtedness to the drawer or to his order, has been held liable to the payee of the bill, we have not found it, and believe such a case does not exist. We are not willing to make such a precedent.

The case made by the bill not being sufficient to maintain it, it is useless to consider the question of practice presented by the assignment of errors.

Decree affirmed.

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(56 Miss. 120.)

Boundary — mistake — estoppel — form of action.

A. pointed out to B., an adjoining land owner, what he supposed to be the boundary line between their lands, and forbade his cutting trees beyond that line. B. cut trees within that line. It was subsequently discovered that A. was mistaken in the line, and that the trees cut were on A.'s land. *Held*, that A. might recover their actual value from B. in *assumpsit*. (See note, p. 315).

ACTION of *assumpsit*. The opinion states the case. The defendant had judgment below.

Frank Johnston, for plaintiff in error.

Nugent & McWillie, for defendant in error.

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CHALMERS, C. J. John A. Miller, now deceased, by mistake cut trees upon Evans' land, and used them in erecting houses and fences on his own land. Evans pointed out to the employees of Miller the supposed boundary line which separated the land of the one from that of the other. A subsequent survey having disclosed the true line, this action of *assumpsit* was brought by Evans against M. Georgie Miller, administratrix of John A. Miller's estate, to recover the value of the trees cut. The court below instructed the jury substantially that no recovery could be had, because of Evans having consented to the felling of the trees, and because the timber not having been by Miller converted into money, *assumpsit* could not be maintained for its value, but that Evans must sue in trespass or trover.

Neither of these propositions was correct under the circumstances of the case.

Evans did not consent to the felling of his trees. On the contrary, he distinctly forbade Miller's employees to trespass beyond what he supposed to be the true line. That he was mistaken as to where the line was, no more deprived him of the right to claim compensation for his trees than to claim ownership in the soil from which they were taken. Consent given to the taking, or acquiescence in the taking, of that to which one supposes that he has no title, will not prevent a recovery of the thing taken, when the true title is subsequently discovered. It will acquit the party taking from all claim for damages, direct or consequential, but it will not divest title, nor prevent the owner from recovering the actual value of his property.

In the case at bar, Evans is entitled to recover the actual value of his trees, to be estimated upon the basis most favorable to Miller, who took them through a mistake into which he was partly led by Evans.

The action of *assumpsit* can be maintained though there was no actual conversion of the trees into money. It is held by many courts of high authority that a tort can only be waived and an action *ex contractu* maintained where the tort-feasor has converted into money the proceeds of his wrongful act, and has thus subjected himself to an action for money had and received.

An intimation of this sort was thrown out in *O'Conley v. City of Natchez*, 1 Sm. & M. 46, and again in *Mhoon v. Greenfield*, 52 Miss. 440, and certainly it is supported by many adjudicated cases in

England and America. A more liberal, and we think, a more sensible rule, is laid down by the later text-writers, and sustained by many courts, to the effect that the tort may be waived and *assumpsit* maintained, whenever the property taken has been converted either into money or into any other beneficial use by the wrong-doer, and especially where it has been so applied to his use as to lose its identity. Cooley on Torts, 95, and cases cited; 2 Greenl. on Ev., § 108, note 5; Hill. on Torts, 42; 1 Hill, note a.

It is impossible to perceive any valid objection to this doctrine. So long as the trespasser retains, in its original shape, the property taken, he may logically deny that he holds it under contract, and demand that he be proceeded against in tort, and that the tort be established against him; but when he has parted with it, either for money or other property, or when he has mingled it with his own, consumed it in its use, or changed its form, he should not be permitted to deny the assumption to pay its value which the law imputes from his method of dealing with it. It is indeed greatly to his advantage to be sued in *assumpsit* rather than in trespass or trover, since in the former action he escapes all claims for damages, obtains the right of set-off, and can be held only for the actual value of the property.

The provisions of section 1536, Code of 1880, abolishing all forms of action, by the provision that "it shall be no objection to maintaining any action that the form thereof should have been different," would render any future discussion of this question unnecessary; but this case having been tried before the adoption of that Code, we dispose of it without reference to its provisions.

Reversed, and new trial awarded.

NOTE BY THE REPORTER.—The subject of mistake or forgetfulness as a defense to a claim of estoppel is learnedly treated in Bigelow on Estoppel, 519.

In *Brewer v. Boston & W. R. Co.*, 5 Metc. 478, parties intending to establish the true line between their lands, agreed upon a boundary by parol, which was not in fact the true line. But they held possession in accordance with the conventional line; and one of the parties being about to sell to the defendants, the other stated to the purchasers that the line agreed upon was correct, and that he did not claim beyond it. After the sale the purchaser made improvements next to the conventional line, with the knowledge of the adjoining owner, who was often present, and repeatedly pointed out the line, without giving notice of any claim to the land. Having subsequently discovered the true line, and that it embraced the improvements, he was permitted to recover up to that line. The court said: "We must consider the declarations and admissions of the demandant as having been made in good faith and by mere mistake. And admissions thus made do not, we think, by law, operate by way of an estoppel * * * Now it does not expressly appear by the case that the declarations of the demandant were made to the tenants' agent with a view to influence their conduct, or that he had knowledge of their

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intention to purchase. Nor does it appear that the tenants will be injured by the flats; for if they purchased with warranty they may be indemnified. We do not however decide the case on these considerations, but on the ground that the demandant has acted fairly under a mistake, and that he has made no declaration contrary to his honest belief at the time, or with any intention to deceive the tenants. And we think it clear that declarations thus made do not operate in the nature of an estoppel. A party is not to be estopped to prove a legal title to his estate by any misrepresentation of its locality made by mistake, without fraud or intentional deception, although another party may be induced thereby to purchase an adjoining lot, the title to which may prove defective, for he may require a warranty; and it would be most unjust that a party should forfeit his estate by a mere mistake.

Mr. Bigelow says, there must have been "knowledge of the true boundary by the one party, and ignorance of it by the other." And this appears to be settled by the authorities he cites.

See *obiter* remarks at close of opinion in *Rutherford v. Tracy*, 48 Mo. 335; s. c., 8 Am. Rep. 104.

In *Davenport v. Turpin*, 43 Cal. 597, where H., being the owner of the undivided half of a parcel of land, and believing that he was the owner of the other half, entered thereon, and M., who held the legal title to the other half, but believed the title was in H., withdrew from the possession; and it appeared that M. did not attempt to practice any deception upon H. in surrendering the possession, but H. was as well informed of the state of the title as M., and did not rely upon any admission or conduct of M., held, that the withdrawal of M. did not estop him from afterward asserting his title at any time within the period fixed by the Statute of Limitations. This case, it will be seen, lacked the element of reliance.

In *Kincaid v. Dormey*, 51 Mo. 532, it was held, that "where parties have agreed upon a division line, and accepted each his own part, in accordance therewith, if the agreement was made and entered into under a mistake of facts, neither party is subsequently precluded from claiming his rights, as under such circumstances there is no presumption of a surrender or waiving of rights, which were given up under a misapprehension. * *

* If two adjoining proprietors are divided by a line which they suppose to be the true one, each claiming only to the true line, wherever it may be, they are not bound by such supposed line, but must conform to the true one, when ascertained. This case, it will be seen, lacked the elements of representation and reliance.

So in *Cronin v. Gore*, 38 Mich. 381, it was held that the estoppel from disputing a boundary arises merely from allowing the adjacent owner to make improvements, so long as neither has supposed the boundary to be wrong. The court distinguished cases of fixing boundaries by agreement and practical location, and observed: "There is no difference between this case and most cases where parties occupy and define their possession under mutual mistake, neither doubting his own or his neighbor's rights, and neither attempting to either fix or disturb a line as either a probable or possible ground of controversy. In a great proportion of ejectment suits parties have acted under similar errors. In such cases improvements not interfered with operate no estoppel, but when the possession has been kept up long enough, the statutes require them to be paid for as they were adjudged to be in this case. Estoppels when allowed must be based on something else than the silent permission of improvements by a party who has not acted in bad faith, or done any act which the other party had a right to regard as meant to govern his conduct." The court also said: "In the present case the location of Gore's eastern line, in the first place, if wrong, was a surveyor's mistake, which certainly could not in any way estop either Gore or Stewart, his grantor, who had sold him four acres, and would have no right to withhold any portion of his grant. This is not pretended."

(As to practical location and acquiescence, see *Turner v. Baker*, 64 Mo. 218; s. c., 27 Am. Rep. 226, and note, 239; *White v. Hapeman*, *ante*, 178.)

See also, *Reynolds v. Mutual Fire Insurance Company*, 34 Md. 280; s. c., 6 Am. Rep. 257; *Second National Bank v. Walbridge*, 19 Ohio St. 419; s. c., 2 Am. Rep. 408.

But there are some cases to the contrary. Thus in *Miller's Appeal*, 84 Penn. St. 391, it was held that where an owner of land in ignorance of his title thereto, by a positive act induces a party to purchase said land from a third person, and the transaction on the part

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of all concerned is in good faith, he cannot afterward, when he discovers his true title, set it up against the purchaser. The court said: "It is a case not of mere silence by one ignorant of her rights, but one where the positive act of Mrs. Ferguson in uniting with the executor to make the sale, misled. 'True (says GISSON, C. J.), the title of a party who ignorantly encourages another to purchase will be postponed; not however for fraud, but for having occasioned a loss which must be borne by some one, and consequently by the author of it.' *Paul v. Squibb*, 12 Penn. St. 290. So HUSON, J., says: 'There is another rule equally well settled, where at the time of a sale the seller or any person present represents the title to be in a certain way, and it turns out not to be so, yet as against the person making the representation it shall be as represented.' 2 Penn. St. 277. In *Buchanan v. Moore*, 13 S. & R. 306, it is said by GISSON, J.: 'If both were equally innocent a loss in consequence of the acts or declarations of the one ought not to be borne by the other.' The same doctrine is asserted in *Lewis v. Carstairs*, 5 W. & S. 200. The doctrine of estoppel is largely discussed by BILL, J., in *Commonwealth v. Moltz*, 10 Barr. 537, wherein he states it as an established principle 'that in all cases where an act is done or a statement made by a party, the truth or efficacy of which it would be a fraud on his part to controvert or impair, the character of an estoppel shall be given to it.' See also, *McKelvey v. Truby*, 4 W. & S. 223. Without further citation the doctrine of estoppel by acts or declarations is well summed up by Justice WOODWARD in *Beaupland v. McKean*, 4 Casey, 131. He says: 'The rule is clear that mere silence will postpone only when silence was a fraud; and a fraudulent concealment of title cannot be imputed to one who was ignorant that he had any title to conceal, but positive acts stand on different ground. For there his title may be postponed even without fraud, in accordance with an equitable principle of universal application, that where a loss must necessarily fall on one of two innocent persons it shall be borne by him whose act occasioned it.' " And in *Woodward v. Tudor*, 61* Penn. St. 332, it was held that where one encouraged another to enter upon land and invest money or expend labor, assuming that he will thereby acquire title, he cannot afterward question such title, though he acted in ignorance of his own right. To the same effect, *Rice v. Bunce*, 49 Mo. 231; s. c., 8 Am. Rep. 129. Mr. Bigelow says, "The Pennsylvania cases find little support in other States."

In *Riley v. Williams*, 73 Mo. 310, the plaintiff, being familiar with the title of certain lands, and being applied to by the defendant for information as to the title of S. to the same, with a view of purchasing the same, as the plaintiff was aware, answered that it was good so far as he knew. Relying upon this, the defendant purchased of S. At the time of giving the information the plaintiff had a tax title to the lands, but did not know or had forgotten it. Held, that he was estopped to assist that title against the defendant. The court said: "He is estopped from claiming the lots as thoroughly as though every word he uttered was known by him at the time of its utterance to be absolutely false — since the evidence clearly shows that he knew defendant was about to purchase of Sumner had come to plaintiff for information, and relied on the information he was thus obtaining. In such circumstances plaintiff was in duty bound to give what he knew to be correct information, or else to refuse information altogether, and cannot now shelter himself behind the plea of momentary ignorance respecting the desired information. If a man 'makes a misrepresentation as to what he ought to have known, and what he did at one time know, although he alleges that at the particular moment he had forgotten it,' and injury ensues, the maker of the misrepresentation is equally as answerable, equally bound to make such misrepresentation good, equally estopped from asserting the contrary of his misrepresentation, as if he knew when uttering it, it was false. *Burrows v. Lock*, 10 Ves. 470."

See *Spencer v. Carr*, 43 N. Y. 406; s. c., 6 Am. Rep. 112, where similar forgetfulness on the part of an infant was held not to estop. The court there said: "I should be entirely indisposed to listen to such an excuse from an adult, as that he had forgotten his title."

In *Storrs v. Barker*, 6 Johns. Ch. 168; 10 Am. Dec. 316, it is declared to be the rule in equity that ignorance of one's legal right does not take the case out of the rule, when the circumstances would otherwise create an equitable bar, and that he who encourages another to buy of a third person a right to which he has himself a title is to be postponed in equity to such a purchaser. The disavowal of claim by the true owner in this case was in ignorance of the illegality of the devise under which the other party claimed.

In *Hendricks v. Kelly*, 64 Ala. 368, a person, proposing to purchase land, and being in-

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formed that there was an unsatisfied deed of trust on it executed by the owner, asked information from the trustee and sole beneficiary of the deed, and was assured by them that the grantor had the right to sell and make title, and that the unpaid balance of the secured debt could be realized from the other property conveyed by the deed. *Held*, that such declarations, though made innocently and inadvertently, operated as an estoppel against the parties making them, or any one claiming subsequently under them with notice, in favor of the person to whom they were made, if on the faith of them he concluded the contract of purchase from the grantor. The court said: "Representations, or admissions, which have been acted on by others, especially when made in answer to inquiries for information on which to base action, and when the purpose of the inquiry is made known, become conclusive, and operate as an estoppel on the party making them, in all cases between him and the person whose conduct he has influenced, if loss must ensue from a denial of their truth. 1 Brick. Dig. 296, §§ 10, *et seq.* The representations or admissions may have been made innocently, and inadvertently; but they will become conclusive, if the party to whom they are made is induced to act upon them, and must sustain injury because of such action, unless they are allowed all the operation they could have if true in point of fact, and made deliberately."

Mr. Bigelow however says: "A party's ignorance of the truth of the representation made by him will not remove the estoppel if he was in reason bound to know the fact," or willfully shut his eyes, or did not know whether it was true or false, "or if his ignorance was the result of gross negligence," as where the owner of land consented to the building of a railway over it, "the work done being of that permanent nature that it could not well be abandoned or removed, of which plaintiff must be charged with full knowledge, she could not afterward treat the company as a trespasser — certainly not for the original entry and work done thereunder, because that was with her permission; nor for using its road-bed since then, because the permission given to build the road carried with it an implied authority to use it when built." *Harlow v. Marquette, etc., R. Co.*, 41 Mich. 331.

In *Payment v. Church*, 38 Mich. 776, the court said: "The third assignment of error relates to the refusal of the court to permit plaintiff to show that at the time of the execution sale of the property in dispute to defendants he, plaintiff, did not know of any defects in the judicial proceedings which would render the judgment and execution sale thereunder void. The defendants, execution purchasers, did not claim title to this property under a valid judgment and execution sale. Their claim was that plaintiff, supposing that a valid judgment had been rendered, requested the release of certain property which had been seized, offering to and actually turning out this property to be sold in lieu thereof, and that these facts and his presence at the sale and conduct thereof as a bidder and otherwise, estopped him from denying the title which they had thus acquired. The plaintiff knew that a judgment had been rendered against himself and others, and that the property was being sold to satisfy that judgment. He apparently took no steps to ascertain whether the proceedings had been regular and a valid judgment rendered or not. If irregular, he clearly could waive the irregularity, and this he might do by actions as well as by words, and the effect upon the defendants would be precisely the same whether he knew of the defective proceedings previous to the sale or not. We think the court did not err in rejecting his testimony."

In *Coleman v. Pearce*, 26 Minn. 123, the court said: "The contention of the defendant Pearce that he was innocent of any intentional wrong or deception in the statements he personally made to the plaintiff concerning the transaction, for the reason that he had been himself deceived by his partner in reference thereto, and actually believed in the truth of the statements when he made them, is of no avail as a defense. His position as a copartner gave him the right to know and the means of ascertaining the actual facts in respect to all matters connected with the partnership, and it imposed upon him the duty of knowing the exact truth as to any statement made by him concerning its transactions to any customer dealing with the firm, and entitled to the information. When the defendant Pearce therefore represented to the plaintiff that the firm of which he was a member was actually holding his wheat as his factor in place of O'Neill, he was bound to know whether it was true or not. Want of knowledge, under the circumstances, was an act of culpable negligence on his part, to which the law affixes the same consequences as to an intentional and known misrepresentation."

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In *Prince v. Arbuckle*, 22 Minn. 417, A. executed and acknowledged a deed in blank as to parties, description, consideration, and date, and delivered it to B., with authority to sell the land, fill the blanks, and deliver the deed. B. filled the blanks to himself as grantee, and deeded the land conveyed to C., who deeded to D., both C. and D. being ignorant of the circumstances of the execution of A.'s deed. Held, that A. was estopped to controvert D.'s title. The court said he was guilty of "such culpable negligence that he ought to be charged with its natural consequences, just as though he had actually intended them."

In *Continental Nat. Bank v. Nat. Bk. of the Commonwealth*, 50 N. Y. 576, a bank was held estopped by its teller's pronouncing the certification of a check presented to him to be genuine, when in fact it was forged. The court said that it is not necessary to an equitable estoppel that the party should design to mislead, and adopted the language of *Freeman v. Cooke*, 2 Exch. 654, "if whatever a man's real intentions may be, he should conduct himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and he did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct by negligence or omission, where there is a duty cast upon any person by usage of trade or otherwise to disclose the truth, may often have the same effect." Where it is a breach of good faith to allow the truth to be shown, then an admission will estop. *Gaylord v. Van Loan*, 15 Wend. 308. The same doctrine was held in *Hast v. Wall*, 60 N. Y. 113, where the plaintiff having stated to the defendant that E. was the owner of a judgment recorded by the plaintiff, and had the right to cancel it, and the defendant paid E. a certain amount and he canceled the judgment, it was held that the plaintiff was estopped from asserting his ownership.

In *Davenport Cent. R. Co. v. Davenport Gaslight Co.*, 43 Iowa, 301, a gas company, with the permission of the municipal authorities, had laid down and was maintaining its pipes in the streets of a city, and a street railway company was incorrectly informed by employees of the gas company respecting the location of the pipes, so that the railway track was laid over them. The court *obiter* observed: "We are inclined to think too that it was the defendant's duty, in view of the rights which others might acquire in the street, to know the precise location of the pipes and be able to give correct information to those who had a right to demand it. If we are correct, and the company did wrongly represent the location of the pipes so as to lead plaintiff to lay its track over them when it was seeking to avoid them, and seeking information from the defendant for the purpose of avoiding them, then we think the defendant would be estopped from claiming the right to disturb the plaintiff's track, even though the defendant was mistaken in regard to the location of the pipes at the time the representations were made."

In *Mutual Life Insurance Co. v. Norris*, 31 N. J. Eq. 583, it is said: "The main purpose of the doctrine is to prevent fraud; there can therefore be no estoppel without fraud, either actual or legal. Hence, to impart this virtue to a representation, it must be made by a person with knowledge of the truth, or what is the same thing in legal ethics, by a person whose duty it is to know the truth, to one who is ignorant of it."

In *Slim v. Croucher*, 1 DeG., F. & J. 518, H. procured a loan on mortgage of lands which the owner had agreed to lease him for ninety-eight years, the owner assuring the mortgagee, before the loan, that he would grant the lease. Subsequently it was discovered that the owner had granted a lease, which was outstanding. The mortgagor was insolvent. Held, that the owner was estopped to assert that he had forgotten the lease, and was liable to reimburse the mortgagee.

This case was followed in *Bulls v. Noble*, 36 Iowa, 618. The court said: "It is urged however that the doctrine of estoppel ought not to be applied for the reason, as plaintiff testifies, that he had no personal knowledge that his tax deed or title covered the lot in controversy. The evidence shows that the plaintiff purchased and took an assignment of the certificate of tax sale, long prior to the time when the defendant purchased the lot and entered thereon and made improvements and has held this certificate down to the time he procured his tax deed thereon. It must be presumed that when he purchased and took an assignment of the certificate, the plaintiff had knowledge of its contents. The lot is situated in the same village where the plaintiff has for many years resided, and near to his residence and place of business, and still nearer to a public house where he was in the habit of frequenting. He had the most ample opportunities of knowing the

situation and condition of the lot and of his own claim or interest therein. The whole evidence in the case convinces us that he must have had knowledge of these facts, and that all that can be claimed in his behalf is, that he may have forgotten, for the time, that he had a claim on the lot arising out of a sale thereof for taxes, and hence remained silent in reference to it while the defendant was improving the same, etc., which would exonerate the plaintiff from any moral fraud in the premises, but not from the legal consequences of his conduct."

A. and D. owned adjoining lots in a city addition, D. had his lot surveyed by the surveyor who laid out the addition, and commenced to build his house up to the western boundary line. A. relying upon D.'s survey measured off 25 feet westward, and built up to his western boundary line, finishing his house months before D. finished his, and by permission used D.'s fence for the eastern wall of his coal shed. Eight years afterward, A. discovered that D. encroached upon his lot four inches, and commenced an action of ejectment. *Held*, that these facts constituted an estoppel, and that A.'s ignorance of the true line was immaterial, the question being one of estoppel by acts in pais. *Action v. Doley*, 6 Mo. App. 323.

In *Trenton Banking Co. v. Sherman*, N.Y. App., the court said, *obiter*: "It is not necessary now to consider what are the limitations, if any, to this doctrine. But as a general rule it would seem to be just that if a person does an act at the suggestion and request of another, the other shall not be permitted to avoid the act when it turns out to the prejudice of an antecedent right or interest of his own, although the advice on which the other party acted was given innocently and in ignorance of his claim. The authorities establish the doctrine that the owner of land may by an act in pais preclude himself from asserting his legal title. But it is obvious that the doctrine should be carefully and sparingly applied, and only on the disclosure of clear and satisfactory grounds of justice and equity. It is opposed to the letter of the statute of frauds, and it would greatly tend to the insecurity of titles if they were allowed to be affected by parol evidence of light or doubtful character. To authorize the finding of an estoppel in pais against the legal owner of land there must be shown, we think, either actual fraud, or fault or negligence equivalent to fraud, on his part in concealing his title; or that he was silent when the circumstances would impel an honest man to speak, or such actual intervention on his part as in *Storrs v. Barker*, 6 Johns. Ch. 166, so as to render it just that as between him and the party acting upon his suggestion he should bear the loss. Moreover the party setting up the estoppel must be free from the imputation of laches, in acting upon the belief of ownership by one who has no right."

In *Mayer v. Erhardt*, 88 Ill. 452, it was said, that where a party sells notes for the payment of which a vendor's lien is reserved in his deed, innocently representing that all the other and prior notes have been paid, leaving those sold the only lien, he will be estopped from enforcing his lien as to a prior note against the purchaser, and the latter will have the first lien. It did not appear however by the evidence that he was unmindful of the existence of the prior note at the time, but the court thought that conceding that fact, it would not avail him; observing: "A very low degree of diligence and capacity in his affairs, it would seem; would have enabled him to have kept these things in mind; and to say that he did not do so, would, in our opinion, amount to a confession that he was grossly negligent. In *Smith v. Newton*, 33 Ill. 230, where Smith made representations in regard to the state of his title, upon the faith of which Newton purchased certain notes, it was said, 'the statements of the defendant in error caused the purchase of the notes by the plaintiff in error, and equity demands he shall not now urge any defect in the title to the injury of the purchaser. It is immaterial whether the defendant in error knew the state of title or not. He ought to have known it to be good, to have justified him in giving to the plaintiff in error the assurances he did * * * If an equitable estoppel can be made out, it has been established in this case.' And this is believed to be in accordance with the weight of the modern authorities on the subject."

So where one proposing to buy certain notes given for land, inquired of the maker and was assured by him that they were all right, he was held estopped to set up that the quantity of land did not hold out, and thus the consideration had failed, he having three years to find out the facts. *Sweeney v. Collins*, 40 Iowa, 540. In *Smith v. Cramer*, 39 Iowa, 412, an action of replevin to recover a horse taken under execution, the plaintiff alleged that the judgment under which execution issued was void; defendant answered that plaintiff had

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pleaded such judgment in another action between the parties, in which defendant who was plaintiff therein, had dismissed the cause ; plaintiff replied that he was then ignorant of the facts which rendered the judgment void. *Held*, that plaintiff would be concluded by ignorance which was the result of gross negligence, such as neglecting for two years to make inquiries concerning the facts.

In *Freston v. Mann*, 25 Conn. 118, where one, with a view of purchasing a promissory note, to which the defendant was nominally a party, inquired of him respecting such note, stating all the particulars, and that he proposed to buy it, and the latter replied that it was a good note and would be paid, it was held that the defendant was bound to know that he would be understood as speaking intelligently, of a contract with which he was familiar, and that he could not afterward be permitted to claim that the note was invalid, by reason of a defense of which he was ignorant when he made such representations. The court said : " Whatever the motive may be, if one so acts or speaks that the natural consequence of his words or conduct will be to influence another to change his condition, he is legally chargeable with an intent, a willful design, to induce the other to believe him, and to act upon that belief, if such prove to be the actual result." " Inasmuch as the doctrine of estoppel especially concerns conscience and equity, ignorance, unaccompanied with culpability of any kind, ought to excuse conduct and language which would otherwise render the author justly responsible for the injury resulting to another who had placed confidence in them." The court instance silence through ignorance. They continue : " There are however other cases where the excuse of ignorance cannot be permitted to avail, without defeating the very principle of justice upon which the doctrine of estoppel is founded. It would seem that where the alleged ignorance involves gross culpability, there should be a limit to the facility with which a party whose words or conduct have misled another to the latter's injury should be permitted to qualify his responsibility by pleading his own fault." The same principle was recognized in *Calhoun v. Richardson*, 30 Conn. 210. As to estoppel of a party whose signature has been forged see *Shieler v. Van Duzee*, 32 Penn. St. 447 ; s. C., 37 Am. Rep. 702, and note, 704 ; *Workman v. Wright*, 33 Ohio St. 405 ; s. C., 31 Am. Rep. 546, and note, 559 ; *Helms v. Wayne Agric. Co.*, *ante*, 147.

In *Beardsley v. Foot*, 14 Ohio St. 414, the like was held, where one inquired of another if he had any claim or lien upon certain land, informing him that he was proposing to buy it if clear, and was answered in the negative, that the other was estopped from claiming on a judgment which was unsatisfied in fact and of record, although he supposed at the time that it was paid. The court said : " We think an estoppel may arise from admissions and declarations made without any fraudulent purpose. The circumstances may be such that ' good conscience and honest dealing ' may require a party to bear the consequences of his own negligent mistake, instead of throwing the resulting loss upon another whom he has misled." " It was a virtual declaration that any judgments in his favor, standing apparently unsatisfied upon the record, and which would be a lien upon the property in question, were in fact satisfied."

In *Copeland v. Copeland*, 38 Me. 525, it was said *obiter* : " that the act or declaration of the party must be willful, that is, with knowledge of the facts upon which any right he may have must depend, or with an intention to deceive the other party ; he must, at least it would seem, be aware that he is giving countenance to the alteration of the conduct of the other, whereby he will be injured if the representation be untrue," citing *Storrs v. Barker*, 6 Johns. Ch. 166.

See *Fisher v. Beckwith*, 30 Wis. 53 ; s. C., 11 Am. Rep. 546, where the case of leaving a deed executed so exposed that it may readily be stolen and delivered to an innocent purchaser, is considered *obiter*.

As to estoppel by negligence in signing an instrument without reading it, see *Ruddell v. Dillman*, *ante*, 153.

UNIVERSAL LIFE INSURANCE COMPANY V. WHITEHEAD.

(58 Miss. 236.)

Insurance—condition precedent—injunction.

A policy of life insurance provided that a paid-up policy would be issued, upon default in payment of any premium after three annual payments, on condition of the surrender of the original policy, duly receipted, within sixty days after such default. *Held*, a condition precedent, not excused by the fact that the insurer was enjoined during the sixty days from issuing any policies.*

SUIT for a paid-up life policy. The opinion states the point. The plaintiff had judgment below.

J. H. Watson, for appellant.

Pittman, Pittman & Smith, for appellee.

CAMPBELL, J. The assured had an option to pay the stipulated premiums and thereby continue the policy in force, or to make default in payment and abandon the policy, or to obtain a paid-up term policy as provided for ; but in order to entitle himself to a paid-up term-policy he was required, within sixty days after default in payment of the premium, to deliver the original policy, duly receipted, to the company. This was a condition precedent upon the performance of which a right was to accrue to the assured to have a new policy on his life for a prescribed time.

The fact that the company was enjoined from the performance of corporate acts except as stated in the order for injunction, and was thus temporarily disabled to issue a paid-up term policy to the assured if he had within sixty days after his default in payment delivered his policy, duly receipted, to the company, did not change the terms on which alone he was entitled to a paid-up term policy. The right to such a policy did not depend on any act or omission of the company, but on something to be done by the assured. It was at his option to secure a right by certain acts ; and although

* See *Wilkinson v. Nat. F. Ins. Co.* (72 N. Y. 490), 26 Am. Rep. 161.

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the company may not have responded to his demand, his right would have been made clear by the concurrence of those acts by which it was to arise.

Although the company was enjoined from issuing a paid-up term policy, the assured was not hindered from doing what would have entitled him to such policy, and which could have been enforced if he had entitled himself to it.

The doctrine that the obligation to perform some act in order to entitle a party to recover against the other party to a contract is excused by the fact that such other party is disabled to do what he has undertaken to do, is not applicable here.

The question presented by this case is, whether the temporary and transient interference by injunction with the regular exercise of its corporate powers by the insurance company entitled the assured to demand a new policy upon conditions different from those stipulated in the policy.

The assured was required to do something which he alone could do, without which he had no right. The obligation of the company was to spring from the doing of the thing stipulated to be done by the assured. The temporary incapacity of the company to issue a paid up term policy, if it had been called for, did not entitle the assured to pretermitt what he was required to do to create a liability against the company, and subsequently to call for a recognition of the right he had lost by his own delay. He should have performed the conditions imposed on him, and his right would have been clear. Had he sent the policy, duly receipted, to the company within sixty days after the default in payment of the premium, it cannot be affirmed that a paid-up term policy would not have been issued. The injunction might have been so modified as to allow the company to issue such policy. It is so manifestly proper that it should have been that it may be assumed that it would have been, and that the assured would have received the paid up term policy to which he would have been entitled if within sixty days after default in payment he had delivered the policy, duly receipted, to the company. If not, his right and the liability of the company would still have been clear. The restraint of the company proved to be temporary. The assured had no right to assume that it would be perpetual. The hinderance to the performance of corporate acts by the company was not in its own act or by its procurement. It had not disabled itself from issuing a

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paid-up term policy. It had not sought the injunction, although it had so acted as to subject itself to it.

This case is obviously distinguishable from *In re Albert Life Assurance Company*, L. R., 9 Eq. 703, relied on by the counsel for the appellee. In that case the assured had to perform a condition, the performance of which entitled him to certain benefits, and before the day arrived on which he was to perform the condition, "the company rendered it absolutely impossible, by their own act, for him to perform that condition." Because, *by its own act*, that company *determined* the contract, for all practical purposes, it was held that non-payment of the premium due after that act did not affect the claim of the policy-holder. In the case at bar the contract was determined by the policy-holder — by his failure to pay the premium, and by his failure to do what was necessary to entitle him to a paid-up term policy — and the company was not absolutely incapacitated to comply with what would have been its obligation if the assured had done what was necessary on his part. He was at least bound to signify his election to take a paid-up term policy, and could not refuse to pay the premium because of the embarrassment of the company, fail to signify his option to have a paid-up term policy, and long afterward obtain what he thought it not worth his while to claim in accordance with the terms of the policy. Affirmative action on his part within the prescribed time was essential to counteract the effect of his default in payment of the premium, and evince his purpose not to abandon the policy. It is evident that the policy was abandoned by the assured, and that the claim for a paid-up term policy is an afterthought. It is not maintainable.

Decree overruling demurrer reversed, and demurrer sustained and bill dismissed.

Decree reversed.

CARRADINE V. CARRADINE.

(58 Miss. 286.)

Gift—delivery.

A. and B., brothers, buried two boxes of silver dollars belonging to them equally. A. died and C. was appointed his executor. Subsequently B. told C. and others that he wanted a third brother, D., to have his share of the

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treasure, after B.'s death. Subsequently C. and D. with the consent and assistance of B., disinterred the money during B.'s life, and deposited it in a house occupied by B. and C. Six days later B. died, and after his burial the money was equally divided between C. and D. *Held*, a valid delivery.*

A PPEAL from executor's accounting. The opinion states the case. The heirs had judgment below.

Barry & Beckett, for appellant.

Fred Beall, for appellee.

CHALMERS, C. J. Thomas G. Carradine, administrator of his deceased brother, Bird Carradine, omitted in his final settlement to account for \$671 of Mexican coinage which he was known to have in his possession, and which the distributees claimed as belonging to the estate of the decedent, but which he asserted was his own property. The chancellor sustained an exception to his account based on such omission, and compelled him to account for the money; and from this decree he appeals. His title to the money rests upon an alleged gift of it to himself by his deceased brother, and the validity of the gift depends upon the question of whether or not it was perfected by a delivery of the money. The facts are as follows: The deceased, Bird Carradine, in conjunction with another brother, William G. Carradine, buried in 1863 a sum of Mexican silver dollars; which belonged in equal portions to the two. William died a few years after the close of the war, the money remaining buried. His son, B. C. Carradine, became his executor, but the money was permitted to remain in the earth. In 1876, Bird Carradine, who was very old, and unmarried, and rapidly growing feeble, told B. C. that he wanted his brother Thomas to have his portion of the buried treasure, and that after his death it must be dug up and equally divided between said Thomas and said B. C., as the executor of his father's estate. He made the same statement and direction to Thomas. A few days before his death however he and B. C. changed their minds, and concluded to disinter the money at once. They sent for Thomas, and he and B. C. proceeded to make search for the money, which was in two boxes. One box they found readily, and this box Thomas proposed to appropriate; but B. C. objecting, they con-

* See *Young v. Young*, (30 N. Y. 422), 36 Am. Rep. 434.

tinued their search for the other. They failed to find it, and after many hours of vain attempt to do so, were forced to bring Bird Carradine to the scene. Directed by him, they soon found the other box. Both boxes were carried to the house jointly occupied by Bird and B. C. Carradine, in the grounds connected with which they had been buried. Six days afterward Bird Carradine died, and the day after his burial the money was equally divided between B. C. and Thomas, in accordance with the directions previously given by the deceased. Some months thereafter Thomas qualified as administrator of his brother's estate. B. C. Carradine sets up no claim to the money in question, either on behalf of himself or his father's estate, but some of the other heirs-at-law of Bird contend that there was no such delivery of it as to pass title to Thomas, and this view was taken by the chancellor. We do not concur in this view. Delivery of personal property is essential to a gift, whether *inter vivos* or *causa mortis*, but it is not essential in either case that it should be simultaneous with the words of donation. It may either precede or succeed the words. If it precede the words, so that the property is already in possession of the donee, no new delivery is necessary; if it succeeds the words, it makes perfect that which was before inchoate. In the case at bar the words had been previously spoken, both to the donee and to the nephew, B. C. Carradine. The subsequent sending for the donee, the directions to dig up the money, the identification of the place where it was to be found, the disinterment of it in obedience to the directions, and the manual possession of it by the donee in its transportation to the house, constituted a delivery and perfected the gift. That it was not divided between the donee and the other joint-owner does not affect the result, nor does its temporary deposit in the house jointly occupied by the deceased and the other joint-owner. It was during this time no more in the possession of the deceased than of the nephew, the legal owner of one-half of it; and it is well settled that a *donatio causa mortis* is good if the property is either delivered to one person to be given to another after the death of the donor, or if being already in the possession of a third person, it is left there with directions to be so given. Even if the gift in this case should be held not good as a *donatio inter vivos* because the subject of it was left in the possession of B. C. Carradine, it became effective as a *donatio causa mortis* by leaving it with him for Thomas G. Carradine, after the death of the donor

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Southerland v. Southerland, 5 Bush, 592; *Waring v. Edmonds*, 11 Md. 424; *Wyble v. McPheeters*, 52 Ind. 393; *Rinker v. Rinker*, 20 id. 185; *Grymes v. Hone*, 49 N. Y. 17; s. c., 10 Am. Rep. 313; *Allen v. Cowan*, 23 N. Y. 502; *Carradine v. Collins*, 7 Smed. & M. 428.

There was no error in the refusal of the chancellor to award a trial by jury. There was no question of fact to be determined, there being no conflicting evidence; and even if there had been, the granting of a jury trial, in the Chancery Court, where no statute prescribes one, is always discretionary with the chancellor, as has several times heretofore been announced by this court.

Decree reversed and cause remanded for a decree in the Chancery Court in accordance with the views announced in this opinion.

Judgment accordingly.

MAHON V. CITY OF COLUMBUS.

(58 Miss. 310.)

Municipal corporation — contract — right of rescission.

A city leased its water works for fifteen years to a citizen, who contracted to keep the machinery in order, to run the pumps in case of fire, and to keep the reservoir filled. The city was to pay him nothing, but gave him the privilege of supplying citizens with water for compensation. The lessee gave security for faithful performance. The lessee became habitually drunken, neglected to keep a supply of water, and neglected the machinery so that it became spoiled and had to be replaced by the city at heavy expense. *Held*, that the city was entitled to have the lease rescinded, although it contained no power of revocation or condition for forfeiture.

BILL to cancel lease. The opinion states the case. The complainant had judgment below.

Orr & Sims, for appellant.

J. E. Leigh, G. A. Evans and L. Brame, for appellees.

CHALMERS, O. J. The mayor and aldermen of Columbus leased to John Mahon, for a term of fifteen years, the water-works of the

city. The lessee bound himself by the terms of the written contract to keep and preserve all the machinery and appurtenances connected therewith in good condition and working order; always to keep the reservoir into which the water was by the machinery to be pumped, filled to a certain specified height; and immediately upon an alarm of fire being given, at once to put the pumps to work, with a view of insuring an ample supply of water. The city was to pay nothing to Mahon for these services, but he was to derive his compensation from the sums received from private persons for supplying them with water. The works seem to have been originally erected and principally used for furnishing water for the fire department of the city, and to have been utilized to a very limited extent by private citizens.

The lessee however was authorized to supply them, provided he did not thereby diminish the quantity of water in the reservoir below the specified limit, and was in this way to receive his compensation. He gave bond, with security, for the faithful observance of his duties. He did not perform those duties. He was repeatedly, if not habitually, intoxicated, and there were very many periods at which there was a failure to keep the requisite quantity of water in the reservoir. Upon one occasion, during a fire, one of the fire-engines of the city was compelled to cease operations because of an insufficiency of water. Upon another occasion, while the county jail was in flames, Mahon was so intoxicated as to be unable to put his machinery in operation, and when another machinist was called in for the purpose, the pumps were found in such a condition that several hours elapsed before they could be started. Finally, by his ignorance, carelessness, or drunkenness, water was allowed to stand and congeal in the pipes and cylinders connected with the machinery, whereby they were burst, and the city forced to replace them at a heavy expense. Thereupon an action at law was instituted by the city in the Circuit Court upon his bond to recover damages for the loss sustained, and this bill was filed in the Chancery Court to cancel and annul the lease.

[Omitting a minor consideration.]

The suit in equity seeks to put an end to a contract which the lessee has by his conduct demonstrated his inability or his unfitness to carry out. There is no stipulation in the lease that a failure upon the part of the lessee to comply with the obligations imposed upon him shall work a forfeiture of it; and this, ordinarily, would

estop a court of chancery from declaring a forfeiture. It is quite clear, for instance, that a mere failure to pay rent at specified dates, or to erect buildings or make repairs, would not authorize a court to put an end to a lease, in the absence of a stipulation to this effect, because in such case each party must be supposed to have looked to his remedy at law to recover damages for a breach of contract; and especially must this be so where a bond has been delivered for the payment of such damages.

But cases may arise, even between private persons, where the duty is of such continuing character, and where the failure to observe it is at once so destructive of the objects of the contract and so impossible of a forced observance by law, that the courts will put an end to it at the instance of the aggrieved party.

The duty of the courts to grant such relief where the interest of the public is concerned becomes imperative, and it is difficult to conceive a cause which could more urgently demand it than the present. The water-works of the city of Columbus belong, not to the mayor and aldermen of the city, but to the citizens. They were erected at heavy expense, out of the public treasury, for the purpose of furnishing a safeguard against fires and a means of supply for private persons. While there seems nothing in the city charter directly prohibitory of such a contract as was here made, we think, when made, it must be held subordinate to a right in the courts to put an end to it whenever it is shown that its continuance imperils the safety, and even the existence of the city. It would not be competent for the city authorities to cede away their right of control over these public works for a long period of time, and by express stipulation contract that neither they nor the courts should have the right to put an end to the lease, even though the lessee should fail to perform the public duties assumed by him. No pecuniary damages could compensate for the loss that might ensue from a single day's failure to perform those duties; and if the contract before us be given such a construction as would forbid relief, it would be clearly *ultra vires* the authority of the city council. It is only by holding that the city has the right, under the facts shown here, to invoke the jurisdiction of the Chancery Court to put an end to the lease, that the contract can be held ever to have had any validity. It is insisted by counsel for the city that the contract was invalid in its inception, because of a failure to stipulate that it should be revocable at the pleasure of the city

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authorities; the argument being that it was incompetent for the latter to abdicate, for themselves and their successors in office, that control over the water-works which was vested in them for the public good. We are not disposed to adopt this view. The mayor and aldermen were by the city charter authorized "to provide the city with water for the use of the fire department or of the citizens, by water-works within or beyond the boundaries thereof." The authority being general, and there being no specification as to the manner of operating the works after their erection, we see no reason why it might not be as well done by contract as by hiring employees or electing a manager; and while it would have been the part of wisdom to have stipulated for a removal of the contractor for cause by the city government, we cannot say that the absence of such a provision rendered the contract null. In such case however there must reside somewhere a power on behalf of the corporation, which is a constituent portion of the State, to put an end to a contract wholly unfulfilled by the contractor, under circumstances which render such failure eminently dangerous to the safety, the health, and the continued existence of the city. A construction that would deny the power of interference to the courts would render the contract void as being in excess of authority on the part of the city officials.

Decree affirmed.

BANK OF HOLLY SPRINGS V. PINSON.

(88 Miss. 481.)

Corporation — transfer of stock — lien.

A bank, empowered to make "all needful rules and by-laws for the * * * mode and manner of transferring its stock," enacted a by-law that the stock should be assignable only on its books, and no transfer should be made by any stockholder indebted to it, and that the certificates of stock should contain notice of this provision. A certificate of stock was issued to C. reciting that the shares were "transferable at the office in person or by attorney." C. pledged the certificate to P. as collateral security, by an assignment indorsed thereon, appointing him attorney to demand and obtain a transfer on the books. The bank refused P.'s demand for a transfer, on the ground that C.

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owed it more than the value of the stock, and that it had a lien on the stock therefor. P. had no actual notice of this claim at the time of the assignment. *Held*, that P. was entitled to the transfer.*

ACTION of damages for refusal to transfer stock. The opinion states the case. The plaintiff had judgment below.

Featherston & Harris, and *Fant & Fant*, for plaintiff in error.

A. M. Clayton and *E. M. Watson* for defendant in error.

GEORGE, J. The principal question raised by this record is whether the plaintiff in error, under its charter and by-laws, and the certificates of stock involved in this controversy, has a lien on the stock as against the defendant in error.

By the third section of the charter of the Holly Springs Savings and Insurance Company, now called the Holly Springs Bank, a directory of five persons and a president were provided for, and they were empowered to make "all needful rules, by-laws, and regulations for the control and management of the business and affairs of said company, its property, and the mode and manner of transferring its stock, and any and all other questions which in their judgment will promote the interests of said company; provided, the same are not inconsistent with the Constitution and laws of the United States or this State."

Under this section the company made various by-laws, of which section 13 provided that "the stock of the company shall be assignable only on the books of the company; and a transfer-book shall be kept, in which all assignments and transfers of stock shall be made, and no transfer of the stock of the association shall be made by any stockholder who shall be liable to the company for any sum of indebtedness, either as principal or otherwise, and certificates of stock shall contain upon them notice of this provision." Section 14 provided that "certificates of stock, signed by the president and cashier, may be issued to stockholders, and the certificates shall state on their face that the stock is transferable only upon the transfer-books of the company; and when stock is transferred, the certificates thereof shall be returned to the company and cancelled, and new certificates issued."

* See *Dickinson v. Cent. Nat. Bk.* (120 Mass. 279), 87 Am. Rep. 351, and note, 353.

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In February, 1874, a certificate for stock, duly signed, was issued to B. S. Crump, as follows: "This is to certify that B. S. Crump is entitled to eighty-two shares, of fifty dollars each, numbered 78, in the Holly Springs Savings and Insurance Company, transferable at the office, in person or by attorney." At the same time a similar certificate, numbered 79, was issued to William Crump.

In March, 1878, B. S. and W. Crump, being in possession of these certificates, borrowed \$6,000 from the defendant in error, and assigned both these certificates to her as collateral security for the loan. This assignment was indorsed on the back of each certificate, and is in the following words: "For value received, I assign this certificate of stock to S. D. Pinson, and authorize her, as my attorney, to demand and have transfer of the same made to her on the books of the company," and signed by the assignor.

Mrs. Pinson, before advancing the money, gave notice of this pledge to the bank, and the note given for the loan not falling due till the fall of the year, when yellow fever was raging in Holly Springs, and the bank on that account was closed, she made no demand for a transfer on the books till in December of the same year, which transfer being refused by the bank, she brought this action to recover damages on account of said refusal. She recovered judgment for the full value of the stock, \$8,200.

The cause has been argued with distinguished ability on both sides, both at the bar and in writing. The authorities cited on both sides are very numerous, and their perusal has greatly aided us in arriving at the conclusion we have reached.

It is well settled that at common law a corporation has no lien on the stock of its shareholders for an indebtedness to it. Such liens, when they exist, result either from a provision in the charter to that effect, or from a by-law enacted by the corporation in pursuance of authority conferred by the charter. Usually the lien, when it exists at all, is given by the charter, which being a public law, as well as the act by which the corporation is created, is notice to all persons dealing with the company. *Union Bank v. Laird*, 2 Wheat. 390. The lien may however be created by a by-law, as was held at an early day by Lord Chancellor MACCLESFIELD in *Child v. Hudson Bay Company*, 2 P. Wms. 12, and very generally since. When thus created, there seems to be some diversity of opinion as to its effect against an innocent purchaser of the stock

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for value and without notice of the lien. Morse, in his work on Banks and Banking, p. 442, denies that the lien can be created by by-law alone as against such purchaser, and Potter on Corporations vol. 1, § 99 and Angell & Ames on Corporations, § 355 say this is unsettled.

This difference is more apparent than real, for it seems to be well recognized that a by-law has no extra-corporate force, and is only binding on those dealing with the corporation who have notice of it, or who deal with it under such circumstances that they are bound to take notice of it. A solution of the question will be found in the right determination of the categories in which notice is inferred. By-laws of private corporations are not in the nature of legislative enactments, so far as third persons are concerned. They are mere regulations of the corporation for the control and management of its own affairs. They are self-imposed rules, resulting from an agreement or contract between the corporation and its members to conduct the corporate business in a particular way. They are not intended to interfere in the least with the rights and privileges of others who do not subject themselves to their influence. It may be said with truth therefore that no person not a member of the corporation can be affected in any of his rights by a corporate by-law of which he has no notice. In some instances, as we have seen, if he have no actual notice he will be held to have constructive notice. In dealing with an officer or agent of the company, a third person, as in other cases of agency, is bound to ascertain the authority of the person with whom he deals. If he deal with an officer — as president or cashier — the general scope of whose duties is well known and ascertained by law, he may rely, without further inquiry, on such officer possessing the ordinary and usual powers. He is not bound by any secret limitation or restriction placed on them by the by-laws or otherwise. If he deals with such officer in relation to a matter outside of these ordinary and usual powers, or with a special agent, he is bound to inquire into his authority. So if the transaction be about a matter on which, by the terms of its charter, there must be a regulation of the company as to the mode of doing it, he is bound to make inquiry as to the mode. Applying these principles to the case before us, we find that the president and cashier are the persons usually employed to give certificates of stock, and that the former, as head of the corporation, is the appropriate person to give the

certificate, in so far as it relates to the membership of the shareholder, and that the cashier, the executive hand of the corporation as to its financial matters, may appropriately certify to the pecuniary interest of the shareholder. Mrs. Pinson therefore was under no obligation to make any inquiry as to the power of these officers to sign the certificates of stock, and in fact their actual authority is not disputed. On looking at the charter, she learned that the "mode and manner" of making the transfer of the stock was subject to the regulations of the company by its by-laws, but she found nothing which specifically authorized the company to interfere with the power of disposing of his stock possessed by each stockholder. The president and directors were authorized to regulate the "mode and manner" of the transfer of stock. This did not include the authority to prevent, or even to restrict the power of disposition. If this authority exists at all, it results from the general power conferred in the charter to make all needful rules and regulations for the management and control of the business of the corporation. She did not therefore have notice from the charter that there would be any by-law preventing a disposition of his stock by a debtor to the bank. The utmost that can be inferred against her on this subject is, that as there must be some mode in which the *jus disponendi* of the shareholders as to his stock must be exercised, she was bound to take notice that there was a regulation on this subject. She was bound only to know as to the "mode and manner" of the transfer, and this information was conveyed to her in the certificate itself, in the phrase, "transferable at the office, in person or by attorney." Having this information on the face of the certificate itself, issued by the proper officers of the company, she was not bound to inquire further. She had a right to repose confidence in the terms of the certificate of the stock. That the form in which the certificates are issued is material and binding on the bank, and may be relied on by a purchaser, is well settled. It is also settled that the statements of such certificates as to the manner of their transfer constitute the regulation on that subject. *Lanier v. Bank*, 11 Wall. 369; *Vansands v. Middlesex County Bank*, 26 Conn. 144. The power of a shareholder to dispose of his stock is not derived from the bank. It is inherent in him as a part of his proprietorship. The bank's power is simply to regulate the mode of its exercise. When this certificate said that Crump was entitled to the named shares of stock, and that they were "transferable at the

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office, in person or by attorney," it asserted the right of a purchaser to have the transfer made at that place, and it asserted no more. The certificate did not say even that there were by-laws of the bank according to which the transfer was to be made, as is usual in such certificates. It contained no intimation on its face of any restriction on the power of transfer, nor did it refer to any other instrument in which such restriction might be found. The assignability of these certificates resulted from a right of the shareholder to dispose of his property. The case with which assignments could be made was an essential element in the value of the shares, enhancing it both to the shareholder and the bank. It is true, they are not commercial paper; but as was said in *Lanier v. Bank*, 11 Wall. 369, they approximate it as near as practicable. The bank having adopted a form, in this case, which asserted the right to transfer with no other limitation on it than that it should be done at the office of the bank, and with no reference to the existence of any by-law or regulation which might impose other restrictions, good faith and fair dealing require that the purchaser in good faith, acting according to the terms of the certificate, should be protected. But there is another ground equally conclusive against the right of the bank to assert this lien against Mrs. Pinson. The by-law under which the lien is asserted directed that notice of the lien should be given by the certificate. This was not done. It is not claimed that this certificate, as it was phrased, was unauthorized; in fact, it was admitted in the argument that all the certificates ever issued by the bank were in the same form. This would therefore be held to have been done with the consent of the directors, who, being stockholder, received their certificates framed as these were. The provision in the by-law requiring the notice must be held to mean that the lien would not be asserted against a person not having this notice. The by-law was binding on the company and its members as a legislative act. The company cannot be heard to assert a claim in violation of its own by-law, especially when the violation is in a matter essential to the protection of the party against whom the claim is asserted. Moreover the power to make the by-law was not by the charter vested in the shareholders, but in the directory. The board could therefore waive or repeal it. *Ang. & Ames on Corp.*, § 354. There was here both a waiver and a repeal, so far as the purchasers of the stock were concerned. The waiver was in the issuance of these particular certificates with the omission of

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the provision as to the notice. The repeal arose from the uniform course pursued by the bank in issuing certificates with the omission. Corporations are not permitted to pass by-laws in secret, and by their conduct to the outside world induce a belief in their non-existence. This uniform conduct, at least as to all who are not members of the corporation, will be held as making a by-law repealing the other. By-laws need not be in writing. They may be adopted as well by the company's conduct, and the acts and conduct of its officers, as by an express vote or an adoption in a meeting. Field on Corp., § 305.

We therefore conclude that the corporation had no lien as against the rights of Mrs. Pinson. Probably the lien exists as against the Crumps, and for this reason the judgment will be reversed, so that the recovery of Mrs. Pinson may be limited to the amount of her debt and interest and the reasonable attorneys' fees stipulated to be paid in the contract of loan. And the defendant in error agreeing to remit all but the principal and interest of the debt, and that judgment should be entered for that amount, it is ordered accordingly.

Judgment accordingly.

EX PARTE TAYLOR.

(58 Miss. 478.)

Statutory construction—"merchants"—"peddlers"—"drummers."

A commercial traveller or "drummer" is not a "merchant" or "peddler," or "of like character."

HABEAS CORPUS. The opinion states the case. The relator was discharged below.

Buck & Clark, for appellant.

Booth & Wyles, for appellee.

CHALMERS, C. J. The mayor and aldermen of the city of Vicksburg imposed a privilege-tax of \$5 per week upon all commercial

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travellers and drummers, and sought to compel its payment from the relator by arrest and imprisonment. The relator sued out this writ of *habeas corpus* on the ground that the city authorities had no right, under their charter, to enact an ordinance imposing such a tax, and being sustained in this position by the judge below, was discharged from custody. The city appeals under that clause of Habeas Corpus Act which gives to either party aggrieved the right to appeal. Code 1880, § 2312. The city rests its right to impose the tax upon a clause of its charter which empowers the board of mayor and aldermen "to levy and collect for corporation purposes a privilege-tax upon the business, trade, or employment of all auctioneers, grocers, merchants, brokers, bankers, cotton-factors and cotton-sellers, retailers, taverns, hotels, boarding-house keepers, coffee-house keepers, retail liquor-dealers, confectioners, peddlers, junk dealers, and others of like character, as the board may designate." If drummers or commercial travellers are "of like character" with the followers of any of the callings enumerated, then the board had the power, by specific designation of them, to impose the tax. They are more nearly like merchants and peddlers than any of the others named, and yet they are quite unlike either. They follow no independent business; they make no contracts for themselves, nor do they come, ordinarily, under any sort of personal obligation. They are mere solicitors of orders for others, and differ in no respect from clerks or salesmen except that they are ambulatory in their operations and do not usually carry or deliver the goods sold.

By their engagements they bind their employers, and not themselves, and they have no other interest in the result of the bargains made than any ordinary clerk would. It seems quite clear that the power does not exist under the charter to levy a privilege-tax on a clerk who remains in the storehouse of his employer and there pursues the occupation of selling his employer's goods. Why should the fact that he walks about the city or goes beyond its limits, doing the same thing, give the added power? If the clerk carried with him the goods sold he would become a peddler, either for himself or for those whose agent he was, and then the tax might be imposed either upon the one or the other; but as he does not do so, he cannot be embraced in the designation of a peddler. When the city charter was enacted by the legislature, the occupation of a drummer or commercial traveller was not only

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well known in this State, but for many years a very large part of the commerce of the State had been transacted by them; yet in the very full enumeration of the classes of business men upon whom the city authorities were authorized to impose a tax, they are not specifically designated. It seems at least doubtful therefore whether the legislature intended to embrace them, and this doubt becomes stronger when we consider the impolicy of such delegation of authority. However wise it might be for the State to derive a revenue from the vocation of these peripatetic salesmen, it would practically amount to an extinguishment of the business to permit every incorporated town in the State to do so. As their operations are confined to no particular locality, but embrace ordinarily the limits of the State, it would seem that the tax imposed upon them should be rather general than local in its character. However this may be, we cannot but regard it as doubtful whether the city of Vicksburg has authority under its charter to impose the tax in this instance; and the rule is well settled that laws imposing duties or taxes are not to be construed beyond the natural import of the language, and are never to be construed as imposing burdens upon citizens upon doubtful interpretation. Potter's Dwar. on Stat. 190, note.

Judgment affirmed.

 MCCARLEY V. BOARD OF SUPERVISORS.

(88 Miss. 482.)

Negotiable instrument—note intended to be sealed—omission of seal.

A promissory note concluded, "witness my hand and seal," etc., but no seal was affixed. *Held*, that it must be treated as a sealed instrument.

BILL to enjoin the collection of the note above described, on the ground that it was barred by the Statute of Limitations as to unsealed instruments. The bill was dismissed below.

Falkner & Frederick, for appellant.

Thomas Spight, for appellee.

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CAMPBELL, J. [Omitting a minor point.] In reference to the accidental failure to affix a scroll to the name subscribed to the note, we are disposed to follow the cases of *Wadsworth v. Wendell*, 5 Johns. Ch. 224; *Thomas Manufacturing Company v. Lathrop*, 7 Conn. 550; and *Rutland v. Paige*, 4 Vt. 181. In the first case cited, Chancellor KENT said: "The omission to affix a seal was a mere mistake, contrary to the intention of the parties; for the instrument concluded with these words: 'In witness whereof I have hereunto set my hand and seal.'" He regarded these words as evidence of intent to make the instrument a sealed one, and treated it as such.

The note of appellant shows it was intended to be a sealed instrument, and a court of equity will not allow him to claim and obtain a benefit arising from the accident of a failure, through mere inadvertence, to do what the words written show was intended to be done, and which, if it had been done, would have precluded the possibility of the assertion of the right now set up by the appellant.

Decree affirmed.

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(56 Miss. 612.)

Attorney — compensation for defending poor criminal.

An attorney assigned by the court to defend a poor criminal cannot recover compensation therefor from the county.*

ACTION for attorney's services. The opinion states the point. The defendant had judgment below.

Jarnagin, Bogle & Jarnagin, for appellant.

Foot & Foots, for appellee.

CAMPBELL, J. The counsel assigned by the court to a person indicted for a capital crime and unable to employ counsel is not

* To same effect, *Wayne Co. v. Waller*, (50 Penn St. 59), 35 Am. Rep. 636, and note, 648.

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entitled to charge for his services and recover their value from the county. The board of supervisors could not lawfully allow such a demand. It is prohibited from appropriating the money that may come into the treasury of the county to any object not authorized by law, and there is no law authorizing an appropriation to this object.

Judgment affirmed.

STOKES V. PAYNE.

(58 Miss. 614.)

Will—power to sell and dispose—mortgage.

An authority by will to "sell and dispose of" the estate, does not warrant a mortgage of it. (*See note, p. 343.*)

BILL to subject land to payment of mortgage. The opinion states the case. The complainant had judgment below.

Raymond Reid, for appellants.

COOPER, J. By her will Mrs. A. P. Stokes gave her lands to her children, and conferred upon her husband, M. M. Stokes, power to sell the same, in the following words: "And I hereby authorize and empower said M. M. Stokes to sell and dispose of any of the property hereby bequeathed in this will, when it shall appear to him to be advisable so to do, having an eye to the support and education of the children." After the death of Mrs. Stokes, M. M. Stokes mortgaged the land to secure the payment of an account for family supplies necessary for the support of the children, which were sold to him on the faith of the security afforded by the mortgage. The mortgagees filed this bill against the children of Mrs. A. P. Stokes to subject the land to sale for the payment of the account. From a decree in favor of complainants this appeal is taken.

In *Sessions v. Bacon*, 23 Miss. 273, it is held, that under the act of 1839 relative to the power of married women over their estates, a married woman having authority to sell takes by implication the

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power to mortgage; and since this decision such has been the well-settled rule. The decision in that case, we think, was correct. The law had conferred upon married women capacity to take hold, and dispose of legal estates; to make certain contracts relative thereto, which might be enforced against their separate estates by action at law as well as in equity; to sell and convey the property owned by them, their husbands joining in the deed when real estate was conveyed. The beneficial interest in the property was in the woman, and the object of the Legislature was to permit her to deal with it as owner, subject to such restrictions and limitations as the statute preserved or established to prevent improvidence or coercion. The powers conferred were given to married women as a class, and the courts, in construing the statute, looked to the policy of the law and the intention of the legislature, as gathered from other provisions *in pari materia*, and held that the power to sell conferred on her included the power to mortgage.

We have examined a large number of the very numerous cases in which the rule as to the extent, construction, and execution of powers has been examined and explained. The fundamental principle that the donee of the power is authorized to exercise it only to the extent and in the manner specified, is recognized in all the cases; but the application of the equally well established rule that courts of equity, in determining whether or not the thing done is within the power conferred, will look to the ends and designs of the parties, and will aid defective executions of powers, has led to diverse and conflicting adjudications. In the cases of *Allan v. Backhouse*, 2 Ves. & Bea. 65; *Mills v. Banks*, 3 P. Wms. 1; *Ball v. Harris*, 4 Myl. & Cr. 264; *Pennsylvania Ins. Co. v. Austin*, 42 Penn. St. 257; *Wayne v. Myddleton*, 2 Ga. 383; *Williams v. Woodward*, 2 Wend. 492; and *Watson v. James*, 15 La. Ann. 386, the power to mortgage has been held to be implied in powers to raise portions out of rents and profits, or to sell.

Such power has been denied in *Stone v. Theed*, 2 Bro. C. C. *243; *Holdenby v. Spafforth*, 1 Beav. 390; *Page v. Cooper*, 16 id. 400; *Devaynes v. Robinson*, 24 id. 86; *Stronghill v. Autrey*, 1 De G. M. & G. 635; *Shaftesbury v. Dutchess of Marlborough*, 2 Myl. & K. 111; *Coutant v. Servoss*, 3 Barb. 123; *Albany v. Fire Ins. Co.*, 4 Comst. 9; *Cumming v. Williamson*, 1 Sandf. Ch. 17; *Wood v. Goodridge*, 6 Cush. 117; *Patapsco Guano Co. v. Morrison*, 2 Woods,

395; *Head v. Temple*, 4 Heisk. 34; and *Bloomer v. Waldron*, 3 Hill, 361 overruling *Williams v. Woodward*, 2 Wend. 492.

In *Stronghill v. Autrey*, Lord St. LEONARDS, after an examination of many of the English cases, said: "My own opinion is, that generally speaking a power of sale out-and-out, or for a purpose, or with an object beyond the raising of a particular charge, does not authorize a mortgage; but that when it is for raising a particular charge, and the estate is settled or devised subject to that charge, then it may be proper, under the circumstances, to raise the money by mortgage, and the court will support it as a conditional sale—as something within the power."

A more liberal construction is made in those cases in which the person who has the power is also interested in the estate on which it is to be exercised, than in those in which the power is given to one to incumber the property of another. In the one case the power is to be liberally, in the other strictly, construed. *Sayles v. Freeland*, 2 Vent. 350.

Cumming v. Williamson, 1 Sandf. Ch. 17, illustrates both the principle that no other power than that delegated can be exercised, and the other principle that a substantial execution is sufficient. Several persons, owners of some lots of land in New York, appointed an agent and authorized him to improve the property, and to raise money for this purpose by mortgage of the lots. The agent employed certain persons to do the work necessary on the lots, but failing to raise money, he mortgaged the lots to the contractors to secure the debt due them. It was held that the object intended to be accomplished had been effected, and the mortgage was valid; but one of the donors of the power was himself a mere trustee under a marriage settlement, by which he was authorized to "grant, bargain, sell, alien, and convey in fee-simple any of the property, and to invest the proceeds in stocks, etc., whenever the beneficiary minded to have it done," and it was held that this power did not authorize him to mortgage, and therefore he could not so authorize the agent who did mortgage the property; and as to the interest of the trustee under the marriage settlement the mortgage was held void.

An examination of the authorities has impressed us with the correctness of those decisions which hold, that as a general rule, mere power to sell does not include the power to mortgage. In most of the cases in which such power has been declared, it is

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stated to be because a mortgage is a sale on condition. In this State, as in many others, a mortgage is now treated at law as in equity—as a mere security for a debt. The legal estate can only be used for the purpose of enforcing the payment of the debt secured. The words of the testatrix conferring the power on her husband are, to “sell and dispose of” the property, and evidence, we think, an intention on her part simply to authorize a conversion of the property into money by an out-and-out sale; and under this power the husband was not authorized to execute the mortgage.

The decree is reversed and bill dismissed.

Decree reversed.

NOTE BY THE REPORTER.—In *Hoyt v. Jacques*, 129 Mass. 286, the same doctrine was held, the court observing: “The question then arises whether this power to sell for the purpose of support includes a power to make a mortgage in fee. In the ordinary case of a power ‘to sell and convey’ land, given by a principal to his attorney, it is clear that the attorney would not be authorized to mortgage the land. *Wood v. Goodridge*, 6 Cush. 117. The two transactions of a sale and a mortgage are essentially different. A power to sell implies that the attorney is to receive for the benefit of the principal a fair and adequate price for the land; a power to mortgage involves a right in the attorney to convey the land for a less sum, so that the whole estate may be taken on a foreclosure for only a part of its value. So, under a will, a trust with a power to sell *prima facie* imports a power to sell ‘out and out,’ and will not authorize a mortgage, unless there is something in the will to show that a mortgage was within the intention of the testator. 2 Perry on Trust, § 768.

“It has been held that where the sole object and purpose of the testator in conferring the power was to pay debts or a particular specific charge upon the estate, and the estate itself is devised subject to that charge, such power to sell may authorize a mortgage; but where it appears from the will that the intention of the testator was to sell the estate and convert it absolutely, a mortgage by the donee of the power is void. *Ball v. Harris*, 4 Myl. & Cr. 264; *Stronghill v. Anstey*, 1 DeG., M. & G. 635; *Haldenby v. Spofforth*, 1 Beav. 309; *Page v. Cooper*, 16 Id. 306; *Devaynes v. Robinson*, 24 Id. 86; *Bloomer v. Waldron*, 3 Hill, 361.

“In the case at bar, the power given to the life tenant is ‘to sell and convey any and all of my real estate, at any time, if necessary to secure such maintenance.’ This language does not in its terms import a power to mortgage; and we find in the will no decisive indications that the testatrix intended to use it in any other than its natural and obvious meaning. Thus used, it gives the husband the power to sell and convey for a fair price any or all of the real estate, if necessary for his comfortable support, but it does not give the right to mortgage the estate for a part only of its value. The intention appears from her language to have been that her husband, if it became necessary for his support, might sell the real estate and convert it ‘out and out,’ and not that he might at his discretion charge it with incumbrances and liens.”

But a power to “sell and exchange” lands embraces a power to partition. *Phelps v. Sherris*, 101 U. S. 370.

KING V. STATE.

(58 Miss. 737.)

Criminal law — selling intoxicating liquor — medicine.

Defendants were indicted for selling intoxicating liquor without a license. The liquor in question was called "Home Bitters," and was composed of thirty per cent of alcohol and the rest of water, bark, peelings, seeds, etc. The defendants alleged that they sold it as a medicine. The court charged that if the compound was intoxicating, and was sold as a beverage, the jury should convict; but if it was sold in good faith only as a medicine, they should acquit, although the compound might be intoxicating. *Held* correct. (*See note, p. 345.*)

CONVICTION of illegally selling intoxicating liquor. The opinion states the case.

Fitz-Gerald & Whitfield, for appellants.

T. C. Catching, attorney-general, for State.

COOPER, J. The appellants were indicted in the Circuit Court of Grenada county for unlawfully selling vinous and spirituous liquors in less quantities than one gallon.

The evidence showed that the defendants sold, in quantities of from a pint to a quart, a compound called "Home Bitters," which the defendants claimed was a proprietary medicine, which, though containing alcohol, it was lawful for them to sell without obtaining license to retail, under the provisions of the Code governing the retailing of vinous and spirituous liquors.

The evidence introduced by the defendants themselves shows that the compound sold contained thirty per cent of alcohol, and that the other ingredients were water and various barks, and the peelings and seeds of trees, fruit, and herbs; that the compound was sold as any other merchandise, to be devoted by the purchaser to such purposes as he desired, and without inquiry by the seller as to the purpose for which it was bought. The evidence for the State showed that it was purchased by the State's witnesses because of the alcohol it contained, and used by them for the purpose of producing intoxication.

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The court charged the jury in effect, for the State, that if the compound was intoxicating, and was sold by the defendants as a spirituous beverage, and not as a medicine, they ought to find the defendants guilty. And for the defendants it instructed the jury that if they believed the defendants sold the compound in good faith as a medicine, and not as a beverage, they ought to be acquitted, although it contained vinous or spirituous liquor sufficient to intoxicate. And these instructions, we think, fairly presented the law of the case. One authorized to sell medicines ought not to be held guilty of violating the laws relative to retailing, because the purchaser of a medicine containing alcohol misuses it and becomes intoxicated; but, on the other hand, these laws cannot be evaded by selling as a beverage intoxicating liquors containing drugs, barks, or seeds which have medicinal qualities. The uses to which the compound is ordinarily put, the purposes for which it is usually bought, and its effect upon the system, are material facts from which may be inferred the intention of the seller. If the other ingredients are medicinal, and the alcohol is used either as a necessary preservative or vehicle for them, — if from all the facts and circumstances it appears that the sale is of the other ingredients as a medicine, and not of the liquor as a beverage, — the seller is protected; but if the drugs or roots are mere pretenses of medicines, shadows and devices under which an illegal traffic is to be conducted, they will be but shadows when interposed for protection against criminal prosecution.

The instructions refused by the court on the application of the defendants were substantially given in other instructions, and it was not the right of the defendants to propound the same propositions in different phraseology. The law applicable to the defense set up had been correctly and sufficiently stated, and the court did not err in refusing to charge in other language the same ideas.

The judgment is affirmed.

Judgment affirmed.

NOTE BY THE REPORTER.—See *Intoxicating Liquor Cases*, 25 Kans. 751; s. c., 37 Am. Rep. 234; *Woods v. State*, ante, 22.

In *Com. v. Ramdell*, Massachusetts Supreme Court, January, 1881, a statute forbidding the sale or keeping for sale without authority, of spirituous or intoxicating liquors, was held not to apply to a druggist who kept liquors only for the purpose of mixing them with other ingredients, according to prescriptions of physicians, to be used as medicine, and also for the purpose of manufacturing such compounds as are commonly used by druggists, to be sold for the purpose of being used as medicines for remedies for sickness and disease. The court said, in substance: In order to determine whether the statute

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applies to a sale, the true test is to inquire whether the article sold is in reality an intoxicating liquor. If it is, the sale is illegal, although it is sold to be used as a medicine or it is attempted to disguise it under the name as a medicine, or it is a mixture of liquor and other ingredients. *Commonwealth v. Hallett*, 103 Mass. 452; *Commonwealth v. Butterick*, 6 Cush. 247; *Commonwealth v. Sloan*, 4 id. 53. But if the article sold cannot be used as an intoxicating drink, it is not within the prohibition of the statute, although it contains as one of its ingredients some spirituous liquor. The sale of such articles is not within the mischief intended to be remedied by the statute or within the fair meaning of its language.

In *Com. v. Hallett*, *supra*, it was held that it was no defense that the seller believed that what he sold was a medicine or not intoxicating.

In *State v. Laffer*, 38 Iowa, 422, the court below refused to charge that if the liquor was only sold after being compounded into medicine with other drugs, and was sold as a medicine, in good faith and with no intent to violate the law, the defendant should be acquitted; and charged that unless the liquor had been so changed that it had lost its distinctive character, it was a violation of law to sell it, but if it had been so changed that it could not be used as a beverage, and had become a medicine and of such a character that it could not reasonably be styled or used as intoxicating drink, its sale was not illegal. These instructions were approved, the court saying: "So long as the liquors retain their character as intoxicating liquors, capable of use as a beverage, notwithstanding other ingredients may have been mixed therewith, they fall under the ban of the law, but when they are so compounded with other substances as to lose the distinctive character of intoxicating liquors, and no longer desirable for use as a stimulating beverage, and are in fact medicine, then their sale is not prohibited."

In *State v. Knowles*, Iowa Supreme Court, March, 1882, a registered pharmacist sold a pint of whisky to a stranger upon his simple statement that he was accustomed to take it as medicine and wanted it as medicine. A conviction was sustained, the court observing: "We incline to think it is true, liquors might be prescribed by a physician and yet the circumstances surrounding the transaction might be such as to warrant the jury in concluding the liquor was sold as a beverage. Conceding a person may prescribe for himself and lawfully determine he should take intoxicating liquors as medicine, and that a druggist in such case may lawfully sell such liquor, it does not follow that it is always so prescribed or sold. It is undoubtedly true, the claim that it is taken and sold as medicine may be a subterfuge, and that while in form sold as medicine, it was in fact a beverage, and so understood by both buyer and seller. The druggist must act in good faith, and the mere fact that a person says he wants intoxicating liquors as medicine will not exonerate the druggist if the circumstances are such as to warrant the court or jury in concluding that in truth and in fact it was sold as a beverage."

In *Carson v. State*, Alabama Supreme Court, December, 1881, it was held that where a special prohibitory act does not except the practicing physician from its operation, he is liable if he administer intoxicating bitters to his patient, but not for using liquors necessary in compounding medicine manufactured and sold by him. The court said: "It was contended under this state of facts, that if the appellant gave or sold the bitters in question as a prescription, and in good faith, he would not come within the prohibition of the statute, and should be acquitted. * * * 'We know of no principle of law which would authorize us to incorporate so important an exception into the statute. The facts of the case may have constituted a good reason why the grand jury should have refused to find a bill, but there is no exception made in the statute in favor of physicians, druggists, or other persons whomsoever, and this court cannot engraft one in their favor without the exercise of legislative power, which it does not possess. The question presented is not a novel one, though not before decided in this State. Mr. Wharton states the rule to be, that 'unless there is an express exception in the statute, the fact that the liquor was bought for medicine is no defense.' 2 Whart. Cr. L. § 2439. In the case of the *Commonwealth v. Kimball*, 24 Pick. 308, the point was made that where liquor was bought to be used *bona fide* for the purpose of medicine, the sale of it did not come within the purview of a prohibitory liquor law, general in terms. Chief Justice Shaw observed in answer to this suggestion: 'If it were sufficient to avoid the prohibition of the statute, for the purchaser to say that the spirit was intended for medicine, it would

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in effect repeal the statute. But the decisive answer is that the legislature has made no such exception. The same or similar points have been repeatedly settled in other cases. See *State v. Brown*, 81 Me. 522, and other authorities cited in brief of Attorney-General,¹ and in 3 Whart. Cr. L., § 2489, note (q). The application of any other rule would be fraught with difficulty if not impracticability. The frequency of imposture on the one hand, and of abuse on the other, would be imminent, and sagacious foresight in this respect may have been a potent reason with the general assembly for excluding exceptions which found place in former statutes, relating to the same subject-matter. We are not to be supposed as intimating that physicians or druggists would be prohibited, under such a statute as the one in question, from the *bona fide* use of spirituous liquors in the necessary compounding of medicines manufactured, mixed or sold by them. This would not be within the evils intended to be remedied by such prohibitory enactments, nor even within the strict letter of the statute."

In *State v. Wray*, 72 N. C. 253, it was held, that a druggist, who in good faith and with due caution sells as a medicine by the direction of a practicing physician, spirituous liquors in a quantity less than a quart, is not indictable therefor. The court said: "The letter of the law has been broken, but has the spirit of the law been violated? The question here presented has been much discussed, but it has not received the same judicial determination in all the States in which it has arisen. In this conflict of authority we shall remember that the reason of the law is the life of the law, and when one stops the other should also stop.

"What was the evil sought to be remedied by our statute? Evidently the abusive use of spirituous liquors, keeping in view at the same time the revenues of the State. The special verdict is very minute in its details, and makes as strong a case for the defendants as perhaps will ever find its way into court again. A physician prescribes the brandy as a medicine for a sick lady, and directs her husband to get it from the defendants, who are druggists. It may be that a pure article of brandy, such as the physician was willing to administer as a medicine, was not to be obtained elsewhere than at the defendant's drug-store. The doctor himself goes to the defendants and directs them to let the witness have the brandy as a medicine for his wife. And the further fact is found, which perhaps might have been assumed without the finding, that French brandy is an essential medicine, frequently prescribed by physicians and often used; and the farther and very important fact is established, that in this case it was bought in good faith as a medicine, and was used as such. After this verdict we cannot doubt that the defendants acted in good faith and with due caution, in the sale which is alleged to be a violation of law.

"In favor of defendants, criminal statutes are both contracted and expanded. 1 Bish. Cr. Law, § 261. Now unless this sale comes within the mischief which the statute was intended to suppress, the defendants are not guilty; for it is a principle of the common law, that no one shall suffer criminally for an act in which his mind does not occur. The familiar instance given by Blackstone illustrates our case better than I can do by argument. The Bolognian law enacted 'that whosoever drew blood in the street, should be punished with the utmost severity.' A person fell down in the street with a fit, and a surgeon opened a vein and drew blood in the street. Here was a clear violation of the letter of the law, and yet from that day to this, it has never been considered a violation of the spirit of the law. Perhaps it will give us a clearer view of the case if we put the druggist out of the question, and suppose that the physician himself, in the exercise of his professional skill and judgment, had furnished the liquor in good faith as a medicine. Can it be pretended that he would be any more guilty of a violation of our statute than the surgeon was guilty of a violation of the Bolognian law? We think not.

"But we would not have it understood that physicians and druggists are to be protected in an abuse of the privilege. They are not only prohibited from selling liquor in the ordinary course of business, but also from administering it as a medicine unless it be done in good faith, and after the exercise of due caution as to its necessity as a medicine. The sale of liquor without a license, in quantities less than a quart, is *prima facie* unlawful, and it is incumbent upon one who does so sell, to show that it was done under circumstances which render it lawful.

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MISSISSIPPI VALLEY COMPANY V. CHICAGO, ST. LOUIS, AND
NEW ORLEANS RAILROAD COMPANY.

(38 Miss. 893.)

Mortgage — by railroad — after-acquired property — hotel.

A railroad company mortgaged all its "real and personal estate and franchises now owned or hereafter to be acquired." Subsequently the company bought a hotel, a store house, some vacant town lots, and a farm of three hundred acres. This property was not used in connection with the railroad, but the company carried on the hotel, and rented the rest. *Held*, that as against a purchaser under a subsequent judgment the mortgagee got no title to this property. (See note, p. 353.)

EJECTMENT. The opinion states the case. The defendant had judgment below.

Craft & Cooper, for appellant.

W. P. Harris, for appellee.

CHALMERS, C. J. This is an action of ejectment, in which the plaintiff claims title by virtue of an execution-sale under a judgment against the former owner of the property, and the defendant claims under a mortgage executed by the same owner. The mortgage was prior in date to the judgment, and if operative on the property here involved, takes precedence of it. The property was not owned by the mortgagor (the New Orleans, Jackson, and Great Northern Railroad Company) at the date of the mortgage, but it is claimed that it passed as after-acquired property by virtue of the terms of the instrument. Whether it did so pass is the question presented. The granting clause of the mortgage conveys, or attempts to convey, all the property of the railroad then owned or subsequently acquired, in these words: "All of its right of way, lands, property, franchises, rights, and appurtenances, and also all the buildings, structures, and improvements thereon, and all and singular, the cars, locomotives, engines, warehouses, depot, machine-shops and machinery, fixtures, utensils, and effects of every kind, nature, and description whatever, in use upon the said railroad way, or in anywise attached or appertaining to the same, intending

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hereby to include all its present real and personal estate and franchises, now owned or hereafter to be acquired, without any exception or reservation whatever."

Are the words, "intending hereby to include all its present real and personal estate and franchises, now owned or hereafter to be acquired, without any exception or reservation," sufficiently definite and descriptive to pass the after-acquired property of the corporation? Certainly they are broad and comprehensive enough, but are they not too much so? That a natural person or a corporation may mortgage property to be subsequently acquired is now too well settled to require elucidation or citation of authorities; but neither by one nor the other can this be accomplished by words of a character so vague and general as to afford to creditors and subsequent purchasers no notice whatever of the property to be embraced. A very different rule obtains where future acquisitions are attempted to be mortgaged, from that which exists with reference to property then owned by the grantor. A man or a corporation may well mortgage "all of its property then owned," without further words of description, because the fact of present ownership serves as an indicator to point to and identify the property. But neither a man nor a corporation can, by general terms only, mortgage — so far as subsequent purchasers and creditors are concerned — every thing that it may thereafter acquire, through all time; for this would be a mere pledge of its capacity of acquisition, and would afford no sort of indication of what was to pass under the instrument.

A deed of "all my estate" or "all my property" is good (*Wilson v. Boyce*, 92 U. S. 320), but a deed of "all the estate that I may hereafter acquire" is a nullity; and while a court of equity might perhaps enforce a mortgage of such a character, as between the parties, after the acquisition of the property, it would be utterly void as to third persons.

A distinction is made by some of the authorities between mortgages of future acquisitions executed by railroad companies and similar instruments made by natural persons. It is said that a mortgage of a railroad and its future property will carry all after-acquired property appurtenant to, and necessary for building and operating the road and carrying out the purposes for which it was created, while a similar instrument will be inoperative if executed by a private person. This is true if the mortgage exe-

outed by the private person is upon a specified piece of property, without reference to any accretions or additions to it, because there can be no accretions of property appurtenant to the person of the mortgagor; but it is untrue if the individual has mortgaged his business and the property then appurtenant to, or afterward to grow out of, and to be added by accretion to the particular business that is pledged. Thus, a natural person, equally with a corporation, can execute a valid mortgage of a ship and the profits of its voyage, or of a factory and the machinery then in it and to be placed in it, or of a farm and the products to be produced upon it, or of a flock of sheep and its natural increase and future grown wool; and so a railroad company can execute, in general terms, a valid mortgage of its road-bed and franchises, and all of its real and personal property then owned or thereafter acquired, provided the future acquisitions be such as belong naturally to the business of constructing and maintaining the road and performing its primary end as a common carrier of passengers and freights. The things which may be deemed essential or useful, and therefore appurtenant, to the great work of building and operating a railroad, will frequently be more extensive and varied in their character than those which can properly be regarded as accretions to the business of private persons; but the principle is the same, and where the facts concur, the law must be the same as to both.

The mortgage in the present case would be clearly void as to the after-acquired property, for uncertainty of description, if it had been executed by a private person, without reference to some enterprise, undertaking, or venture as to which the future property could be deemed an accretion. It is equally so when executed by a railroad company, if the property to which it is sought to apply it was not appurtenant to the business of the company. When property is to be deemed appurtenant to a railroad enterprise is discussed in many cases, a few of which we cite: *Mosley v. Mississippi & Ohio R. Co.*, 52 Miss. 127; *Dinsmore v. Racine, etc., R. Co.*, 12 Wis. 649; *Seymour v. C. & N. R. Co.*, 25 Barb. 284; *Shamokin V. R. Co. v. Livemore*, 47 Penn. St. 465; *Walsh v. Barton*, 24 Ohio St. 28; *Parish v. Wheeler*, 22 N. Y. 494.

In *Pierce v. Emery*, 32 N. H. 484, it was held that after-acquired property, where appurtenant, would pass by a mortgage of a railroad and its business, although there was no provision as to fu-

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ture property. This doctrine is denied, and we think properly, by the better considered cases.

The property involved here does not fall within any well-considered definition of the term "appurtenant," nor can it possibly be regarded as either necessary or legitimate to the business of a railroad corporation. It consisted of a hotel, a brick store-house, some vacant town-lots, and a farm of three hundred acres. The hotel was not used as a railroad eating-house, there being no station-house or depot at the town, but seems to have been used as an ordinary hotel for the entertainment of guests. The other property was rented out for the several purposes for which it was adapted.

It was used for these purposes by its former owners before its acquisition by the railroad company, and continued to be so used after that acquisition. It was applied to no new use; and except that after its acquisition the several tenants occupying it paid rents to the railroad company, it served no beneficial purpose whatever to the railroad. Clearly, it was not appurtenant to it. It is urged however that the company making the mortgage was authorized by its amended charter to acquire this property; that this amended charter had been granted by the legislature before the execution of the mortgage, and that therefore while the language used in reference to after-acquired property would be too vague if used by a private person, or a corporation ordinarily, it will be sufficient when used by this corporation, and will cover all the property that it was by its charter authorized to hold. The amended charter was enacted with reference to a proposed extension of the railroad from Canton to Aberdeen. For this purpose it vests the company with the right to acquire and hold, "at each termination of said railroad, and at any other place along the line of said railroad, or in the vicinity thereof, any quantity of land, not exceeding in any one place five hundred acres, to be used for all necessary purposes of said railroad, or to be disposed of at pleasure, for the purpose of constructing and maintaining said railroad.

We entertain serious doubts whether this act authorized the acquisition of real estate anywhere except "at the terminations" of the proposed extension, — to wit, at Canton and Aberdeen, — or along the line of the road to be built between those terminations. The land here involved lies more than a hundred miles below Can-

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ton, and along that portion of the road which had been completed years before the passage of this act. But conceding that the act authorized the purchase of land all along the line, both of the completed and of the uncompleted portion, from the Louisiana State line to the town of Aberdeen, then it is safe to say that it would justify the acquisition of a million acres of land.

For what purpose was this enormous amount of land to be obtained and used? Either "for all necessary purposes of said railroad," or "to be disposed of at pleasure, for the purpose of constructing and maintaining said railroad." If it was to be bought and used "for necessary purposes," then it was to become appurtenant to the road; but we have seen that the property here involved was not so bought or used, but on the contrary, it was when bought, and it thereafter remained, dedicated to purposes utterly foreign to the business of a common carrier.

If on the contrary we are to understand that by the words "to be disposed of at pleasure, for the purpose of constructing and maintaining said railroad," the company was empowered to buy this immense quantity of land, scattered along a line of three hundred miles, situated in many counties, and with no restrictions except that it should be in five-hundred-acre tracts and in the vicinity of the road, it follows that the company was vested with power to enter the market generally as a purchaser, holder, and speculator in real estate. It might become the owner of plantations, and of factories, and of entire towns and villages, and buy and sell and lease lands applied to every use known among men; nor would it be bound to dedicate them, after they were acquired, to any purpose whatever connected with its business as a common carrier. It would differ therefore as to such lands in no respect from a private person, so far as its right, either of acquisition or of disposition, was concerned, and hence there must be applied to its conveyances the same rules of construction as if they were made by private owners. It follows, that as the mortgage of the after-acquired property would have been void as to third persons if made by a private person, it is equally so as to the lands here involved, though made by a railroad company.

The case of *Calloun v. Paducah Railroad Company*, 9 Cent. L. J. 66, is quite in point, and the opinion of HAMMOND, J., of the United States District Court for the Western District of Tennessee, compensates by its learning and ability for any lack of authorita-

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tive character in the tribunal. Strikingly similar also is the case of *Morgan v. Donovan*, 58 Ala. 241.

There is no merit in the objection, that even though the mortgage was not operative on the land, plaintiff obtained no title to it under the sheriff's sale, because at the time it occurred, the property was in the hands of a receiver appointed by the Federal court in the proceedings of foreclosing the mortgage. The receiver was not ordered to take possession of this land specifically, but was only directed to take charge generally of the property embraced in the mortgage; and nowhere in the proceedings was this land specifically alluded to until the filing of the receiver's inventory, more than a year after the sale by the sheriff under execution and the purchase of the property by the plaintiff.

The receiver never took visible possession of the property, except by receiving rents from the tenants previously in possession, nor was any thing done to admonish the public that this property was claimed as being embraced in the mortgage. Under these circumstances, as the property was not embraced in the mortgage, the purchaser at the execution-sale got a good title.

Judgment reversed, and judgment here, on the agreed state of facts, for plaintiff.

Judgment reversed.

NOTE BY THE REPORTER.—In *Parish v. Wheeler*, 23 N. Y. 494, it was doubted that canal boats, purchased by a railroad company, and used and run in connection with the road, but beyond its terminus, were not within a mortgage of engines, cars, etc., "and all other personal property in any way belonging or appertaining to the railroad," but it was held that the company could not set up *ultra vires* to defeat the mortgage.

In *Mobile & Ohio R. Co. v. Mosely*, 52 Miss. 127, it was held that detached lands granted by the State to the railroad subsequent to its charter are not exempt from taxation under the charter exempting "any portion of said railroad."

In *Walsh v. Barton*, 24 Ohio, St. 23, it was held that a mortgage executed by a railroad company on "the road" of the company, "whether made or to be made, acquired or to be acquired, and all property, real or personal," of the company, "whether now owned or hereafter to be acquired, used, or appropriated for the operating or maintaining the said road," is not a lien upon real estate of the company, then owned or afterward acquired, which has not been used or appropriated for operating or maintaining the road.

In *Morgan v. Donovan*, 58 Ala. 241, the charter of a railroad company empowered it, among other things, to construct and operate a railroad between the cities of Mobile and New Orleans, and to require and hold such real property "as may be necessary and convenient, for the construction, maintenance and management of the railroad," and also to acquire "any steamboats, piers, wharves and appurtenances thereunto belonging that the directors may deem necessary, profitable and convenient for the corporation to own, use and manage in connection with said railroad." In deeds of trust, executed by the railroad corporation, the words of conveyance were qualified by clauses like the following: "The lands occupied by said railroad, or hereafter acquired, owned and occupied
• • • including all depots, etc., now owned and occupied, or hereafter acquired
in connection with said portion of said railroad, situate upon or lying within the limits of

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said cities, or upon or adjacent to said portion of said railroad, and the route and line thereof." In another mortgage or deed of trust, the conveyance was qualified as follows: "All depots, station-houses, wharves and warehouses * * * now owned and occupied, or hereafter to be acquired, and used in connection with its said railroad, together with all steamboats, and personal property used, or hereafter to be used, exclusively for the constructing, maintaining, operating or conducting the business of its said railroad." *Held*, 1. The charter authorizes the corporation to acquire and hold property to be used in the construction, maintenance and operation of the road, or in connection therewith, but not the acquisition of property not needed or used for one of these purposes, or in connection with such purposes. 2. The mortgages conveyed only such property, real or personal, as was useful and necessary and employed in the construction, maintenance, operation, repair and preservation of said railroad; and property acquired and owned, and not used or to be used in connection with the railroad, and in promotion of the direct and proximate purposes of its construction, did not pass. 3. Property bought of an opposition steamship line, not with a view of employing it in connection with the business of the road, but to withdraw it from business, thereby preventing competition, was not authorized to be acquired by the charter, and not covered by the granting clauses in the mortgages.

In *Seymour v. Canandaigua, etc., R. Co.*, 25 Barb. 284, it was held that the mortgage gave no lien upon land lying outside of the railway track and branches, or not used for shops, depots, stations, turn-outs, etc.

In *Dunmore v. Racine, etc., R. Co.*, 12 Wis. 640, the same was held in respect to a tract of 285 acres of woodland, seven miles from the railway. The court said: "It is said that these lands were purchased by the company for the wood and timber upon them, which were to be used upon the road. Upon the score of economy it might be desirable that a corporation should own the woodland and coal beds from which it could obtain all necessary fuel. So perhaps it might be convenient for it to own pine lands from which it could obtain timber for fences and bridges, and mills to manufacture the timber; or a line of steamboats for the transportation of freight and passengers by water to and from the road. Still these things are not at all necessary for the full use and enjoyment of the road and franchisees. A railroad corporation can purchase its fuel as well as a natural person. It could not have been contemplated by either party that the company would buy timber lands several miles distant from the line of the road, for the purpose of profit or convenience, when those lands were not necessary for the use and enjoyment of the road. The lands and real estate spoken of in the mortgage were those upon which the road to be constructed, or in which the company might acquire the right of way, or lots or parcels of land along the line of the road used or to be used for erecting thereon depots, engine houses, shops, and all such structures as might be necessary for the business and operation of the road, or upon which drains and embankments might be made for the protection and preservation of the same."

In *Calhoun v. Paducah & Memphis R. Co.*, 9 Cent. L. Jour. 66, the property acquired was 44 acres of land adjacent to the railway, conveyed in consideration of the company's locating a station at a certain place. This seems to be based more upon the uncertainty of description than on the doctrine of *ultra vires*. The court said: "No doubt a railroad company might by contract agree that the mortgage should cover all lands which should be subscribed to it for stock, or to be granted to it by the government in aid of its construction, or the like description; but every such contract, if not designating by metes and bounds the lands to be acquired, should indicate with reasonable certainty the particular property, so that all persons would know what was intended to be conveyed. And I think in such cases the power to mortgage would be limited to such lands as the company at the date of the instrument had an expectation of obtaining, or to such lands as could be designated in the agreement itself, as those upon which it was to operate."

In *Shamokin Valley R. Co. v. Livermore*, 47 Penn. St. 465, the same was held in respect to town lots, not directly appurtenant or indispensably necessary to the enjoyment of the franchises. The lots were designed for a canal basin for shipping coal.

In *Hamlin v. European & N. A. Ry. Co.*, 72 Me. 88, the mortgage was held to cover lands subsequently purchased for engine and car houses and other accommodations, to which the company at the time had located and expected to build the road, but to which

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the road was not extended. The court said : "That the expectations of business have not been realized, that the right to use them in direct connection with the road, without further legislative authority, has expired, does not relieve them from the incumbrance. They are claimed still, on grounds that the evidence would scarcely enable us to deny, to be necessary for the future development of the railroad. We could not say from the testimony, that the purchase was, at the time, an extravagant and unreasonable one. The case of a railroad holding more property for its own purposes than its present needs demand, is entirely different from one in which the company buys other property, distinct from the road and its appurtenances, not intended or necessary for the present or prospective exercise of its franchise, and therefore not within the purview of the mortgage."

CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

BECKER V. WESTERN UNION TELEGRAPH COMPANY.

(11 Neb. 87.)

Telegraph company — condition — negligence — repeated messages.

A telegraph company may lawfully restrict its liability for errors in dispatches beyond the amount paid for transmission, to cases where the dispatches are repeated and paid for as such; and under such a regulation, an error in a dispatch is not *per se* sufficient evidence of negligence to authorize a recovery beyond that amount. (*See note, p. 361.*)

ACTION for damages for negligence in transmitting a telegram. The error complained of was the writing "sixty" for fifty." There was a verdict for the amount paid for transmission. The opinion states other facts.

George W. Doane, for plaintiff in error.

James M. Woolworth, for defendant in error.

LAKE, J. The alleged errors to be considered pertain to the instructions to the jury. The charge was full, covering every point arising in the case necessary for the jury to be informed upon, and

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was evidently prepared with care. We shall notice only those portions of it which counsel has specially pointed out as being objectionable.

It is said by counsel in brief that "the most serious error committed" is in those portions of the charge wherein "reference was made to the right of defendant to adopt rules and regulations whereby to restrict its liability in this class of cases, and the effect of the adoption of such rules and regulations." The ground taken on this point, being that there was nothing in the pleadings by which these rules and regulations were made at all material. In all this we think counsel labors under a mistake. Evidently the rules and regulations referred to by the judge were those copied into the answer as being on the message blanks, and forming the basis of the alleged contract between the Telegraph Company and Preston & Co., the senders of the message. The most important of these rules, in fact the only one of them necessary to be here considered is that which provided that the company should "not be liable for mistakes * * * of any unrepeatd message beyond the amount received for sending the same." The jury were told that this was not an unreasonable regulation on the part of the company, and "if brought to the knowledge of persons dealing with them, and assented to by such persons, would be binding upon them. The effect of such regulation was given in these words, which we accept as a fair statement of the law: "If therefore you find from the evidence, that at the time this telegram was sent, the rules and regulations which have been offered in evidence were in force along the defendant's line, and such regulations were brought to the knowledge of the senders of the message, or the plaintiff, and assented to by them, and the message in question was not directed to be repeated, and that the defendant used suitable instruments and machinery, and employed skillful operators, who in the transmission of the message used ordinary care, and were not guilty of actual negligence in the premises, then the plaintiff cannot recover any thing beyond the price of the message and interest thereon." This, we are of opinion, stated the law correctly, and was necessary to a fair comprehension of the pleadings and evidence by the jury. The fact that the judge referred to these printed conditions upon which alone messages would be sent as "rules and regulations" instead of "agreement" or "contract" is of no importance. We suppose that they were essentially rules

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and regulations until accepted by delivering the message for transmission subject to them, when they at once became a binding contract between the company and the senders. *Wolf v. Western Union Telegraph Company*, 62 Penn. St. 83; s. c., 1 Am. Rep. 387.

The plaintiff's counsel tendered several instructions embodying the views for which he now contends on this question. They are substantially that a telegraph company cannot, by a rule or regulation like the one just referred to, limit liability for errors committed in the transmission of messages — that such a rule is unreasonable and contrary to public policy. Further, "that the defendant, in order to exonerate itself from responsibility for the mistake, should have shown how it occurred, and in the absence of such proof the jury will be justified in presuming a want of ordinary care on the part of the defendant." These, with other propositions of similar import founded thereon, which in the absence of all restrictions would have been suitable, were rejected by the court, and as we think, properly. The law, as it is finally settled by the better authorities, is otherwise.

In *Redpath v. Western Union Telegraph Company*, 112 Mass. 71; s. c., 17 Am. Rep. 69, it was laid down that the sender of an un-repeated message written upon a blank of the company having a printed heading which specified that the company should not be liable for mistakes in the transmission of an un-repeated message beyond the amount received for sending it, could not recover more unless the mistakes were caused by gross negligence or fraud. And in *Breese v. United States Telegraph Company*, 48 N. Y. 132; s. c., 8 Am. Rep. 526, it was ruled that conditions in telegraphic messages as to repeating are reasonable, "and where a person writes a dispatch and signs his name upon a blank containing a printed condition that the company will not be responsible for the correct transmission of the message unless it is repeated at an additional expense, he cannot recover for an error in transmission, the condition as to repeating not being complied with, and there being no allegation of gross negligence or willful misconduct on the part of the company." In the opinion of EARL, C., this language is used: "But while they" (telegraph companies) "are bound to transmit all messages delivered to them, they have the right to make reasonable rules and regulations for the conduct of their business. They can thus limit their liability for mistakes not occasioned by gross negligence or willful misconduct, and this they

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can do by notice brought home to the sender of the message, or by special contract entered into with him." And in the same case Lott, C. C., in speaking of conditions limiting the company's liability printed upon message blanks, said: "The conditions are reasonable, and not against public policy. On the contrary, they subserve to carry out the objects for which telegraphic associations are created, and especially to secure the receipt of a message in the words in which it is written and delivered for transmission. A party using such a blank, and writing his dispatch thereon, assents to the terms and conditions on which it is sent. If he omits to read or to become informed of them it is his own fault. A contract voluntarily signed and executed by a party in the absence of misrepresentation or fraud with full opportunity of information as to its contents, cannot be avoided on the ground of his negligence or omission to read it, or to avail himself of such information." See also on this point *Western Union Telegraph Co. v. Carew*, 15 Mich. 525; and of similar import is *Grinnell v. Western Union Telegraph Company*, 113 Mass. 299; s. c., 18 Am. Rep. 485—where GRAY, C. J., says: "According to the weight of authority a regulation that the liability of the company for any mistake or delay in the transmission or delivery of a message, or for not delivering the same, shall not extend beyond the sum received for sending it, unless the sender orders the message to be repeated by sending it back to the office which first received it, and pays half the regular rate additional, is a reasonable precaution to be taken by the company, and binding upon all who assent to it, so as to exempt the company from liability beyond the amount stipulated for any cause except willful misconduct, or gross negligence on the part of the company."

The reasonableness of the rule thus recognized by the courts must be seen and acknowledged by all who give heed to the fact sworn to on the trial by several expert witnesses, and denied by none, that the only known means of reaching absolute accuracy in the transmission of messages by telegraph is by repeating them, that is returning them to the office from which they were sent, for comparison with the original.

Many additional authorities on this point might be cited, but these will suffice, representing, as they do, the current of decision. In the case before us there is no pretense either of gross negligence or willful misconduct on the part of the company, so that the in-

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instructions complained of are not only amply supported by adjudged cases, but were suited to the facts upon which the jury were to pass. Besides the evidence of the existence of the rules and regulations limiting the company's liability, known and accepted by the plaintiff, was clear and convincing, notwithstanding his assertion that he had never read the headings to the message blanks. It is a noticeable fact however that the plaintiff in his testimony does not deny that he well understood that such rules and regulations existed, and the importance of having his messages repeated to insure accuracy in their transmission. He admitted on his cross-examination that for several years he had received and sent hundreds of dispatches, sometimes several in a single day, writing them, as occasion required, on the company's blanks, or on ordinary blank paper, so that if he did not know of these rules it was because of his own gross carelessness. From what we have said it follows that the instructions requested by the plaintiff, as to the degree of care the company was bound to exercise in the transmission of the message in question, were properly refused, as by these "the highest degree of care and diligence" on the part of the company would have been requisite to avoid liability to the full extent of the damages caused by the alleged error, notwithstanding the aforesaid limitation. So, too, of other instructions tendered and refused, to the effect that the defendant, in order to escape such liability *in any degree* for the erroneous transmission of the message, notwithstanding said rules and regulations, was bound to show just how the error was brought about, and that it was through no fault on his part.

As we have already seen, where such rules and regulations are in force, and the message is sent with reference to them, the company cannot be made liable beyond the amount received for sending the message, and interest, except for injuries caused by gross negligence or willful misconduct on the part of its agents. And so the jury were told, as shown by the instruction above quoted and others of like import.

The eighth paragraph of the instructions is pointed out by counsel as specially objectionable, and was in these words: "If there were such rules and regulations, so assented to, the mere fact that there was an error in the message as delivered would not of itself, without further proof of carelessness, be sufficient to authorize the plaintiff to recover any thing beyond the price of the message and interest thereon." There is no error in this instruc-

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tie, which is fully supported by the authorities already cited. The jury did return a verdict in favor of the plaintiff for the sum paid by him for sending the message, which was all he was entitled to, gross negligence or willful misconduct being neither charged nor proved, and he being clearly subject to the rule or regulation by which the company restricted its liability to that amount.

As before stated, the charge in this case was evidently prepared with care, and after a full examination of all the authorities cited we are satisfied that it states the law of the case correctly, in every particular, and therefore the judgment must be affirmed.

Judgment affirmed.

NOTE BY THE REPORTER.—On the first point decided in this case, see note, 1 Am. Rep. 430; 9 Id. 149; 11 Id. 168, and the cases to which they are appended; also *Tyler v. West. Union Telegraph Co.*, 60 Ill. 421; s. c., 14 Am. Rep. 38; *Sweatland v. Illinois, etc., Tel. Co.*, 27 Iowa, 432; s. c., 1 Am. Rep. 285; *Rittenhouse v. Ind. Line of Tel.*, 44 N. Y. 263; s. c., 4 Am. Rep. 673; *Western Union Tel. Co. v. Tyler*, 74 Ill. 168; s. c., 24 Am. Rep. 282, and note, 283. In *Western Union Tel. Co. v. Griswold*, 37 Ohio St., it was held that a mistake in the message is *prima facie* negligence.

TOMPKINS V. BATIE.

(11 Neb. 147.)

Tender — on mortgage after default.

A tender after default of the amount due upon a chattel mortgage must be kept good to be availing.*

REPLEVIN of property mortgage. The opinion states the point.

Marshall & Sterritt, for plaintiff in error.

N. H. Bell, for defendant in error.

LAKE, J. The principal question in this case was raised in the court below by an instruction to the jury, of which the following is a copy: "If you find from the evidence that illegal interest has been taken or contracted for, and that the bank was not the *bona fide* holder thereof" (the note and mortgage), "then, to make the

*To same effect, *Crain v. McGorn* (86 Ill. 431), 29 Am. Rep. 37, and note, 41.

tender sufficient in amount, it was enough for Batie to tender the sum received by him without any interest; and in order to discharge the lien of the mortgage, such tender, if refused, need not be kept good, or the money brought into court."

The act of tender here referred to took place long after the maturity of the note which the mortgage was given to secure, and the question is, whether the last proposition of this instruction states the law correctly. Counsel on each side of the question have argued it with consummate skill, and have fortified their respective positions with numerous authorities, so that we are relieved from the labor of extended research. From the cases cited, it is certain that there is much conflict in the more recent decisions as to the effect of a tender upon a security, if made after what is termed the "law day" has passed, while probably there is none as to the fact that if made on that day it will release the property from the lien. At the common law, to have this effect, the tender must be made on the day the debt falls due, but need not be kept good.

The case of *Kortright v. Cady*, 21 N. Y. 343, is one on which great reliance is placed by defendant's counsel to sustain the charge of the court. This however appears to have been decided by a divided court, and DENIO, J., while concurring in the result, did so, as he said, on the ground that the question was so far determined by previous decisions in that State, "that it would be indiscreet to examine it in the light of reason and the analogies of the law." But WELLES, J., went further, and gave a very able dissenting opinion, wherein he reviewed the course of decisions by the courts of New York, and concluded that the better authority was that a mere tender of payment after the maturity of the debt would not release the lien of a mortgage given to secure it. However the rule of the majority of the court in that case is now to be regarded as the settled law of New York, as it confessedly is of Michigan.

But in California, where the contrary rule prevails, it was said in one case that "The debtor is as much in default for not paying when the debt is due, as the creditor is in default for not receiving the money afterward when offered. It would be very harsh to hold that the debt is lost—the general effect of losing the security by a mere refusal, at a particular moment, to receive it—that refusal induced, too, as it might be, by a variety of circumstances morally excusing it, or at least not grossly violative of any positive

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duty, and productive of little or no injury to any one." *Perre v. Castro*, 14 Cal. 519. See also *Himmelmamn v. Fitzpatrick*, 50 id. 650, and *Crain v. McGoon*, 86 Ill. 431; s. c., 29 Am. Rep. 37. In the last named State it is held that a tender of the amount due after the time agreed upon, unless kept good, will not operate to release the lien of a mortgage given to secure it. And this, we think, is a wholesome rule. The foregoing, and most of the cases cited, relate to real estate mortgages, whereas the one now under consideration is a mortgage of chattels, which in this State is, in its legal effect, strikingly analogous to a mortgage of real property under the common law. "According to the strict rule of the common law, a mortgagor who failed to perform the conditions contained in the mortgage would forfeit his right to the land, or to redeem it by subsequently tendering the amount due upon the mortgage." *Broom & Hadley Com. (Am. ed.)* 612, 2 note, 88. In case of such forfeiture the mortgagor could obtain relief only in a court of equity, wherein the land mortgaged was treated as a mere pledge which the mortgagee held as a security for the debt due to him.

In *Adams v. Nebraska City National Bank*, 4 Neb. 370, it was held, "That a chattel mortgage transfers to the mortgagee the whole legal title to the things mortgaged, subject only to be defeated by performance of the condition." And in *Tallow v. Ellison*, 3 id. 63, it was said, "The legal title passes to the mortgagee, subject to the mortgagor's right to perform the condition, and after default the legal title is said to become absolute in the mortgagee." But the mortgagor has a right to redeem the mortgaged property, at any time before it is sold, by paying the mortgage debt.

Such being the character of the instrument, and the rights of the parties under it, there seems to be good reason for adopting as our guide those adjudications which were made upon mortgages governed by the principles of the common law, rather than those in which the mortgage is regarded as a mere security for a debt, and the mortgagor regarded as the owner of the fee until his right of redemption is foreclosed. Accordingly we feel constrained to hold, as was held in *Crain v. McGoon*, *supra*, that a tender after the law day must be kept good or it will be entirely unavailing as such.

[Omitting a question of fact.]

Reversed and remanded.

COBB, J., dissents.

COBBEY V. BURKS.

(11 Neb. 187.)

Extortion — absence of corrupt intent.

The absence of corrupt intent is no defense to an action against an officer for a statutory penalty for taking illegal fees.*

ACTION for penalty for taking excessive fees. The opinion states the point. The plaintiff had judgment below.

Colby & Hazlett and Sabin & Smith, for plaintiff in error.

Bush & Richards and Ashly & Pemberton, for defendant in error.

COBB, J. [Omitting minor points.] The third point presents the question, whether the good faith of the defendant in demanding and receiving fees in excess of those allowed by law for the services rendered constitutes a defense to the action. Having examined the numerous cases cited to this point, I find but little ground for varying the plain and obvious language of the section of the statute, which provides that, "If any officer whatever, whose fees are hereinbefore expressed and limited, shall take greater fees than are so hereinbefore limited and expressed, for any service to be done by him in his office, * * * such officer shall forfeit and pay to the party injured fifty dollars, to be recovered as debts of the same amount are recovered by law." In some of the States, to whose cases we are cited, the language of the statute is materially different from that above quoted. That of Massachusetts is, "that if any person shall willfully and corruptly demand and receive any greater fee or fees," etc. While in an action under such statute it is obvious that proof of good faith on the part of the defendant would constitute a defense to the action, yet it is equally clear that a decision thereunder furnishes no key to a proper construction of our own statute. In criminal prosecutions for extortion at common law the *mala fides* of the act is the very

* See *Seeman v. State* (35 Ark. 439), 37 Am. Rep. 44.

essence of the offense ; yet cases of that kind furnish no authority applicable to a suit for the penalty imposed by our statute. Of such character are the citations to Bishop's Criminal Law, etc.

The provisions of the statute of Pennsylvania were similar to those of our own. Under it, in a case exactly in point, the Supreme Court of that State used the following language : " The penalty imposed by this act may be incurred by exacting fees, which are supposed at the time to be legally demandable. By the very words of the prohibitory clause the *taking* is the gist of the offense. Ignorance of the law will not excuse in any case ; and this principle is applicable, and with irresistible force, to the case of an officer selected for his capacity, and in whom ignorance is unpardonable. The very acceptance of the office carries with it an assertion of a sufficient share of intelligence to enable the party to follow a guide provided for him, with an unusual attention, clearness, and precision. On any other principle a conviction would seldom take place even in cases of the most flagrant abuse ; for pretexts would never be wanting. Sound policy therefore requires that the officer should be held to act at his peril ; and we are of the opinion that the absence of a corrupt motive, or the existence of an agreement by the party injured, furnishes no justification for doing what the law forbids." *Coates v. Wallace*, 17 S. & R. 75.

I think the rule is correctly laid down by Greenleaf in the following language : " But where the statute commands that an act be done or omitted, which in the absence of such statute might have been done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute, it seems, will not excuse its violation. Thus, for example, where the law enacts the forfeiture of a ship, having smuggled goods on board, and such goods are secreted (on board) by some of the crew, the owner and officers being alike innocent by ignorance of the fact, yet the forfeiture is incurred notwithstanding their ignorance. Such is the case in regard to many other fiscal, police, and other laws and regulations, for the mere violation of which, irrespective of the motives or knowledge of the party, certain penalties are enacted ; for the law in these cases seems to bind the party to know the facts, and to obey the law at his peril." 8 Greenl. on Ev., § 21.

[Omitting a minor point.]

Judgment affirmed.

PURCELL V. McCOMBER.

(11 Neb. 209.)

Contract — for services — part performance — recovery pro tanto.

On a contract to work for a given time, at a fixed and entire compensation where the employee abandons the employment before the end of the term, he may recover *quantum meruit*, less any damage occasioned by the breach.

SUFFICIENTLY reported, 35 Am. Rep. 476.

OLESON V. STATE.

(11 Neb. 276.)

Criminal law — rape — resistance — evidence — declaration.

To constitute rape of a woman in possession of physical and mental power, not overcome by threats nor so placed that resistance would be useless, it must appear that she resisted to the extent of her ability.*

In a trial for rape the particulars of the complaint of the prosecutrix to third persons cannot be given as evidence in chief, (*See note, p. 369.*)

CONVICTION of rape. The opinion states the case.

M. H. Sessions and *A. G. Scott*, for plaintiff in error.

C. J. Dilworth, for defendant in error.

MAXWELL, C. J. The plaintiff was convicted of rape at the October term, 1880, of the District Court of Lancaster county, and sentenced to imprisonment in the penitentiary for three years. There are seventeen assignments of error, but two of which will be considered. It is objected that the verdict is not sustained by sufficient evidence. The only testimony to establish the charge is that of Barbara Kastel, the prosecuting witness.

In the case of *Garrison v. People*, 6 Neb. 283, it was held that

* See *Whittaker v. State* (50 Wia. 515), 35 Am. Rep. 354, and note, 369.

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where the jury are satisfied beyond a reasonable doubt of the guilt of the accused from the testimony of the prosecuting witness alone, they will be justified in returning a verdict of guilty, as in many, if not most cases, it would be impossible to convict except upon such testimony. But by this it is not meant that the jury are bound to believe the unsupported testimony of the prosecuting witness and return a verdict of guilty. The accusation is easily made, and difficult to be defended against by one ever so innocent. Ordinarily there are circumstances connected with each case which tend to establish or disprove the charge, and thereby strengthen or diminish the credit to be given by the jury to the testimony of the prosecuting witness.

In the case of the *People v. Morrison*, 1 Park. Cr. Rep. 625, it is said, to constitute the crime there must be unlawful and carnal knowledge of a woman by force, and against her will. * * *

* * The prosecutrix, if she was the weaker party, was bound to resist to the utmost. Nature had given her hands and feet with which she could kick and strike, teeth to bite, and a voice to cry out; all these should have been put in requisition in defense of her chastity." Id.

In the *People v. Dohring*, 59 N. Y. 374; s. c., 17 Am. Rep. 349, it is held that "in order to constitute the crime of rape of a female over ten years of age, when it appears that at the time of the alleged offense she was conscious, had the possession of her natural mental and physical powers, was not overcome by numbers, or terrified by threats, or in such place or position that resistance would have been useless, it must also be made to appear that she did resist to the extent of her ability at the time, and under the circumstances."

In the case of *People v. Benson*, 6 Cal. 221, it is said: "That there was no outcry, though aid was at hand, and the prosecutrix knew it; that there was no immediate disclosure; that there was no indication of violence on her person, and that the act was committed at a time and under circumstances calculated to raise a doubt as to the employment of force, are put as strong circumstances of defense, not as conclusive, but as throwing a doubt upon the assumption that there was a real absence of assault."

In *Whitney v. State*, 35 Ind. 506, the court say: "In prosecutions for this crime the best of judges of ancient and modern times have laid down certain tests by which to be governed in ascertaining

the truthfulness of the party preferring the charge. They concur in saying that her evidence should be carefully considered; and if the witness be of good character; if she presently discovered the offense, and made search for the offender; if the party accused fled for it; these and the like are concurring circumstances which will give greater probability to her evidence. But on the other hand if she be of evil fame, and stand unsupported by the testimony of others; if she concealed the injury for any considerable time after she had an opportunity to complain; if the place where the act was alleged to have been committed were such that it was possible she might have been heard, and she made no outcry; these and the like circumstances carry a strong but not conclusive presumption that her testimony is false or feigned."

In the case at bar, the offense is alleged to have been committed about ten o'clock at night, in the shanty in which the prosecutrix resided in the city of Lincoln. Several neighbors resided within hearing distance, but she made no outcry. Her clothes were not torn, nor were there any marks of violence on her person to indicate a struggle, although there is some testimony showing there was a slight mark upon her neck; but she seems to have testified on the preliminary examination that there were no such marks. Taking the testimony of the prosecutrix as true, and it fails to show such resistance on her part as will warrant a conviction for rape.

The State, over the objection of the accused, was permitted to prove by Mrs. Mulrooney and Mrs. Crips what the prosecutrix had told them on the day after the commission of the alleged offense in regard to it. Greenleaf thus states the rule in regard to such admissions: "Though the prosecutrix may be asked whether she made complaint of the injury, and when and to whom; and the person to whom she complained is usually called to prove that fact, yet the particular facts which she had stated are not admissible in evidence, except when elicited in cross-examination, or by way of confirming her testimony after it has been impeached. On the direct examination the practice has been merely to ask whether she made complaint that such an outrage had been perpetrated upon her and to receive only a simple yes or no. Indeed the complaint constitutes no part of the *res gestæ*; it is only a fact corroborative of the testimony of the complainant; and when she is not a witness in the case is wholly inadmissible." 1 Greenl. Ev., § 213.

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The testimony referred to was not competent as evidence in chief to prove the commission of the offense, and the court below erred in admitting it for that purpose. The particulars, when not a part of the *res gestæ*, are not evidence of the truth of the statement of the prosecutrix, and cannot be inquired into in her examination-in-chief, or proved by other testimony except in corroboration. *Johnson v. State*, 17 Ohio, 539; *Baccio v. People*, 41 N. Y. 265; *Lacy v. State*, 45 Ala. 80; *People v. McGee*, 1 Denio, 19; *Stephens v. State*, 11 Ga. 225.

It is unnecessary to notice the other errors assigned. The judgment of the District Court is reversed and the case remanded for further proceedings.

Reversed and remanded.

NOTE BY THE REPORTER.—*Contra*: *State v. Kinney*, 44 Conn. 153; 26 Am. Rep. 436. The authorities are well reviewed in *Baccio v. People*, 41 N. Y. 265, as follows: "Mr. Greenleaf therefore states the limitation of the rule in harmony with this view. Though the prosecutrix may be asked, whether she made complaint of the injury and when and to whom; and the person to whom she complained is usually called to prove that fact, yet the particular facts which she stated are not admissible in evidence, except when elicited on cross-examination, or by way of confirming her testimony, after it has been impeached. On the direct examination, the practice has been to ask, whether she made complaint that such an outrage had been perpetrated upon her and to receive only a simple 'yes' or 'no.' Indeed, the complaint constitutes no part of the *res gestæ*; it is only a fact corroborative of the testimony of the complainant. And where she is not a witness in the case, it is wholly inadmissible." (Vol. 3, § 213.)

"Mr. Phillips states the same rule: 'In prosecutions for a rape, it is the common practice and is strictly regular, to inquire whether the woman made a complaint against the prisoner recently after the injury, but the particulars of the complaint, stated by her on the former occasion, are clearly not admissible as evidence of the truth of her statement; that statement, having been made in the absence of the prisoner, cannot be used as evidence against him; nor can it be admitted as evidence in confirmation of her statement on the trial.' This statement of the rule is not very clear, but it means, I think, that although the principal fact that she made complaint of having suffered an outrage recently after it was committed, is admissible, proofs of its particulars are not admissible for any purpose. (Vol. 1, 233.)

"Mr. Russell, in his treatise on Crimes, after mentioning among the circumstances bearing on the credibility of the female, the fact that she presently discovered the offense, says: 'It is the usual form in cases of rape, to ask the prosecutrix whether she made any complaint, and if so, to whom; and if she mentions a person to whom she made complaint, to call such person to prove that fact. But it has been the invariable practice not to permit either the prosecutrix or the person so called to state the particulars of the complaint during the examination in chief.'

"These several writers refer to the numerous cases in England and in this country, in which, not without some conflict however the subject has been discussed."

"Thus, in *Re v. Clarke*, 2 Stark. 394, HOLYWOOD, J., held that the fact of her having made the complaint was evidence, as also was the description of her state and appearance at the time; but that the particulars of the complaint were not evidence of the truth of her statement. In *Reg. v. Walker*, 2 M. & Rob., it was held by PARK, Baron, that the

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- female assaulted may be confirmed by proof, that she recently after the alleged outrage made a complaint, but that the particulars of what she said cannot be asked in chief of the confirming witness, though they may in cross-examination. In *Regina v. Megan*, 9 C. & P. 428, evidence having been given of the appearance of the female on arrival at home early in the morning, immediately after the alleged outrage, and of her condition on examination by a surgeon on a subsequent day; and also, that as soon as she reached home in the morning she made complaint of what had happened to her and it was proposed to inquire the terms of the complaint, it was excluded. In that case, as also in *Regina v. Gatbridges*, 9 C. & P. 471, where evidence of her recent complaint was wholly excluded, the injured female had not been examined as a witness. Thus showing that her declarations are not, *per se*, evidence against the party charged. In *People v. McGee*, 1 Denio, 19, the Supreme Court of this State approve and follow the decision in the two cases last cited. In *People v. Hulce*, 3 Hill, 316, Bronson, J., after citing the admonitory remarks of Lord HALE on the ease with which the accusation may be made and the difficulty of defending by the party charged, be he ever so innocent, adds: "Cases of this character do not call for any relaxation of the rules of evidence for the purpose of supporting the accusation. * * * There is much greater danger that injustice may be done to the defendant in cases of this kind, than there is in prosecutions of any other character."

In *Johnson v. State*, 17 Ohio, 593, it was held that the fact of complaint and the *substance* of it might be given in evidence to corroborate the prosecutrix, but not as evidence in chief to prove the commission of the offense. But in *McCombs v. State*, 8 Ohio, St. 643, it was held that the *substance* of the complaint might be given in evidence in the first instance to corroborate. Citing *Johnson v. State*, *supra*. The other cases cited at the close of the principal case support its doctrine. The Connecticut case seems quite opposed to the weight of authority.

KANSAS MANUFACTURING COMPANY V. GANDY.

(11 Neb. 442.)

Marriage—mortgage by wife to secure husband's note.

A wife executed a mortgage on her separate property to secure her husband's note, before the note was due, without any agreement to extend the time of its payment or other new consideration. *Held*, not enforceable.

FORECLOSURE. The opinion states the case. The defendant had judgment below.

France & Sedgwick, and *Lamb Billingsley & Lamberton*, for appellant.

W. T. Scott and *W. W. Giffen*, for appellees.

MAXWELL, C. J. This action was instituted in the District Court of York county to foreclose a mortgage executed by Margaret C

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Gandy upon her separate estate to secure a note executed by her husband. The defense is want of consideration. The court below found the issues in favor of the defendant and dismissed the action. The plaintiff appeals to this court.

It appears from the bill of exceptions that the defendant, Lemuel J. Gandy, had purchased wagons from the plaintiff to the amount of about \$6,000, giving his notes therefor, and that the note which the mortgage was given to secure was for a portion of the wagons. The note is as follows :

" \$464.00

YORK, NEB., *Sept. 16th*, 1878.

" Twelve months after date I promise to pay to the order of the Kansas Manufacturing Company four hundred and sixty-four dollars, at McWhirter's Bank, with exchange, value received, with interest at 12 per cent per annum from January 16th, 1879, until paid.

" L. J. GANDY.

" Due *Sept. 19*, 1879."

The mortgage to secure this note was executed on the seventh day of December, 1878.

Blackstone says : " A consideration of some sort or other is so absolutely necessary to the forming of a contract that a *nudum pactum*, or agreement to pay any thing on one side without any compensation on the other, is totally void in law ; and a man cannot be compelled to perform it. As, if one man promises to give another £100, here there is nothing contracted for or given on the one side, and therefore there is nothing binding on the other. And however a man may or may not be bound to perform it in honor or conscience — which the municipal laws do not take upon them to decide — certainly those municipal laws will not compel the execution of what he had no visible inducement to engage for ; and therefore our law has adopted the maxim of the civil law that *ex nudo pacto non oritur actio*. But any degree of reciprocity will prevent the pact from being nude." 2 Bl. Com. 445.

Kent says : " It is essential to the validity of a contract that it be founded on a sufficient consideration. It was an early principle of the common law that a mere voluntary act of courtesy would not uphold an assumpsit, but a courtesy showed by a previous request would support it. There must be something given in ex-

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change, something that is mutual, or something which is the inducement to the contract, and it must be a thing which is lawful and competent in value to sustain the assumption. A contract without consideration is a *nudum pactum*, and not binding in law though it may be in point of conscience." 2 Kent Com. 463.

PATTERSON, J., in *Thomas v. Thomas*, 2 Q. B. 859, says: "A consideration means something which is of some value in the eye of the law moving from the plaintiff. It may be of some benefit to the defendant, or some detriment to the plaintiff, but at all events it must move from the latter."

Originally, under the doctrine of uses, the relationship of blood or the marriage relation, when supported by a seal, was held sufficient to raise a use. But if there was no seal, and the contract was intended to take effect as a bargain and sale, which might have its origin in parol, a valuable consideration was necessary. See 2 Rolle Abr. 788, p. 15. Uses were originally equitable estates, which under the operation of the statute of uses, were converted into legal, the statute joining the use and possession of the land together so that the owner should possess the same estate in the use and possession. Sanders says: "Uses may be raised either upon a pecuniary consideration, or upon what is called a good consideration, which is that of blood or marriage. Whatever be the form of the conveyance creating and transferring a use upon the former consideration, it is a bargain and sale, and must be enrolled as such; but conveyances raising upon or by virtue of the latter are termed covenants to stand seized, and they are not within the words of the statute of enrollments, nor within the policy of it, because the consideration of blood and marriage is of a public nature." 2 Sand. on Uses and Trusts, 96-7.

I have thus stated the principles governing the consideration of contracts, because in some of the cases they seem to have been overlooked. It is the consideration that gives vitality to a contract, and without it the contract cannot be enforced. If in an action between the original parties to a promissory note, the maker may plead that the note was without consideration, and if this defense is established, defeat a recovery thereon, why may not a party, who has executed a mortgage to secure a precedent debt of another, be permitted to show that there was no consideration for the mortgage? The cases rest upon the same principle. In the one case the plaintiff seeks to recover a judgment against a defendant which may be

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satisfied out of any property he may possess. In the other it is sought to subject specific property of the defendant to the payment of the amount found due on the mortgage. In both cases there must be a consideration to support the contract. In the case at bar the plaintiff surrendered nothing, nor did the defendants, or either of them, receive any benefit whatever from the execution of the mortgage. It was given to secure a note that had at that time nearly ten months to run, and there was no extension of the time of payment, nor any consideration for its execution. It cannot therefore be enforced. *Wearse v. Pierce*, 24 Pick. 141; *Conwell v. Clifford*, 45 Ind. 392; *Smith v. Newton*, 38 Ill. 230. The judgment of the court below, dismissing the action, is therefore affirmed.

Judgment affirmed.

NICHOLSON V. BARNES.

(11 Neb. 452.)

Negotiable instrument — place of payment ambiguous — demand.

A note was dated at one place, made payable "at ———," and had the name of another place appended to the maker's signature. *Held*, that demand at the banks at the place of date, with the fact that the defendant did not live or do business there, was insufficient to change the indorser, in the absence of proof that the maker had absconded or that inquiry had been made for him at the other place.

ACTION on a note. The opinion states the case. The plaintiff had judgment below.

Thummel & Platt and *Abbott & Caldwell*, for plaintiff in error.

Batty & Ragan, for defendant in error.

MAXWELL, C. J. This is an action by the indorsee against the indorser upon a promissory note, of which the following is a copy:

"GRAND ISLAND, NEB., Oct. 29, 1878.

"Nine months after date, for value received, I promise to pay to the order of A. R. Oliphant \$71.25 at ———, with interest at ten

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per cent per annum from date until paid, together with a sum equal to ten per cent of said amount as attorney's fee, if action is brought on this note or the mortgage given to secure the same, or if the same is not paid when due.

"\$71.25.

[Signed]

JERRY TYRELL.

"Danebrog, Howard county."

A copy of the note is attached to and made a part of the petition. It is alleged in the petition "that said note was made payable in the town or city of Grand Island, in Hall county, Nebraska, but not made payable at any particular place in said Grand Island, and that on the day and date when said note became due said plaintiff made diligent search and inquiry throughout the entire town of Grand Island for the maker of said note, but was wholly unable to find him or learn of his whereabouts." It is also alleged that the note was presented to the several banking houses in Grand Island for payment, and payment thereof was refused, and that no part of the same has been paid, etc.

The defendant, Nicholson, demurred to the petition upon the ground that the facts stated therein were not sufficient to constitute a cause of action. The demurrer was overruled and judgment entered in favor of Barnes. Nicholson brings the cause into this court by petition in error.

In the case of *Townsend v. Star Wagon Co.*, 10 Neb. 619; s. c., 35 Am. Rep. 493, it is said: "The contract which the plaintiff in error entered into by indorsing said note was, that if the same should be duly presented for payment to the makers at maturity — either to them personally or at their residences or places of business — and the same was not paid, and he should be duly notified of such presentation and non-payment, that then he would pay the money called for by the note, together with legal costs of such demand and notification."

In this case it is alleged in the petition that the demand was made at the banks in Grand Island. Is such demand sufficient to charge the indorser? The presumption is that the maker resides at the place where a note is dated, and that he contemplated payment at that place. 3 Kent. Com. 97; *Stewart v. Eden*, 2 Cain. 127; *Duncan v. McCulloch*, 4 S. & R. 480; *Lowery v. Scott*, 24 Wend. 358. But it is a presumption merely; and if the maker resides elsewhere within the State when the note falls due, and that place

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be known to the holder, demand must be made at the maker's place of residence. 3 Kent. Com. 97; *Anderson v. Drake*, 14 Johns. 114; 7 Am. Dec. 442; *Galpin v. Hard*, 3 McCord, 394. The reason is the holder of a note is bound to use reasonable and proper diligence to find the maker and demand payment, where no particular place is designated for payment.

The indorser undertakes conditionally to pay if the maker does not, and this imposes on the holder the necessity of taking the proper steps to obtain payment from the maker. The allegations in the petition that a demand was made at the banks at Grand Island and that the maker had no residence or place of business there, are not sufficient. There is no allegation that the maker had absconded, or that his residence was unknown, or of any fact to excuse an actual demand. The words "Danebrog, Howard Co.," beneath the signature, evidently were intended to indicate the residence of the maker; but there is no allegation of a demand at that place or that he had removed therefrom. But it is said that the residence being indicated beneath the signature, it is not binding on the holder to make a demand at that place. Undoubtedly this designation of the residence would not be sufficient to fix the place where alone a demand should be made; but it is a circumstance to put the holder on inquiry as to the residence of the maker. In all probability, had inquiry been made at Danebrog, the maker would have been found.

[Minor points omitted.]

Reversed and remanded.

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(11 Neb. 537.)

Criminal law — insanity.

Occasional oddity or hypochondria does not amount to insanity excusing the commission of a criminal offense. Nothing short of the inability to distinguish right from wrong can do so.*

CONVICTION of malicious shooting. The opinion states the case.

*See *Andersen v. State* (43 Conn. 514), 21 Am. Rep. 409; *Sartain v. State*, post.

Phelps & Thomas, for plaintiff in error.

C. J. Dilworth, attorney-general for State.

MAXWELL, C. J. The plaintiff was convicted at the November, 1880, term of the District Court of Colfax county of maliciously shooting one August Hirn, and was sentenced to imprisonment in the penitentiary for five years. He now prosecutes a writ of error to this court.

The only error relied upon is the following instruction, given on behalf of the State. "The law requires something more than occasional oddity or hypochondria to exempt the perpetrator of an offense from its punishment. If the defendant was in possession of reason, thought, intent, a faculty to distinguish the nature of actions, to discern the difference between moral good and evil, then the fact of the offense and the condition of mind above described, proved beyond a reasonable doubt, your verdict should be guilty."

The court, prior to giving the above, had instructed the jury fully upon all the questions raised by the indictment, and also upon the question of insanity, and the instructions so given are certainly favorable to the accused. The instruction complained of in effect says to the jury that mere oddity or hypochondria is not insanity, and if the accused at the time of committing the offense was in possession of reason, and was able to discern right from wrong, he would be responsible for his actions.

Webster defines the word "insane," as "exhibiting unsoundness of mind; mad; deranged in mind; delirious; distracted."

The question here involved was before this court in *Wright v. People*, 4 Neb. 409. The court say: "It is a familiar rule of the common law that to constitute a crime there must, in almost all cases, be, first, a vicious will, and secondly, an unlawful act consequent upon such vicious will. *Broom & Hadley Com. (Am. ed.)*, 339. And where an individual lacks the mental capacity to distinguish right from wrong, in reference to the particular act complained of, the law will not hold him responsible. *Flanagan v. People*, 52 N. Y. 467; s. c., 11 Am. Rep. 731; *State v. Lawrence*, 57 Mo. 574; *Com. v. Heath*, 11 Gray, 303. This mental incapacity may result from various causes, such as nonage, lunacy, or idiocy, and whenever interposed as a defense, the inquiry is necessarily reduced to the single question of the ability of the accused to dis-

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tinguish between right and wrong at the time of committing the act complained of. *Freeman v. People*, 4 Denio, 28. But even where insanity is shown to exist, and whether it be general or partial, the rule seems to be substantially as charged by the court below, that if there remains a degree of reason sufficient to discern the difference between good and evil, at the time the offense was committed, then the accused is responsible for his acts. *Hopps v. People*, 31 Ill. 385."

We adhere to the rule laid down in the above opinion as being sound in principle. There is therefore no error in the instruction, and the judgment of the court below must be affirmed.

Judgment affirmed.

CASES
IN THE
COURT OF ERRORS AND APPEALS
OF
NEW JERSEY.

HANNON V. WILLIAMS.

(7 Stew. [34 N. J. Eq.] 255.)

Bank — insolvent — set-off.

A depositor in an insolvent savings bank, who also owes it for borrowed money, cannot set-off his deposit against such debt, although the deposit consisted of the borrowed money. (See note, p. 383.)

BILL for set-off. The opinion states the case. The bill was dismissed below.

Peter Bentley, for appellant.

W. B. Williams, in person.

GREEN, J. The appellant in this case was a depositor in the Mechanics and Laborers Savings Bank of Jersey City. While such depositor, and more than a year before the bank was declared insolvent, she borrowed from the corporation the sum of \$2,000, and secured the same in the usual manner by bond and mortgage on her real estate. The money borrowed was, at her request, placed to her credit in the bank, subject to her check, and the amount entered

in her pass-book as a deposit. After this transaction, the appellant continued to make cash deposits and draw checks until the bank discontinued business, when the balance standing to her credit amounted to \$2,416. Included in this balance was a considerable portion of the money borrowed of the bank, which she had allowed to remain on deposit. The corporation having been adjudged insolvent by the chancellor, a receiver appointed, and demand made by him for the payment of the mortgage debt, the appellant filed her bill praying that her deposit might be offset against the amount due on her bond and mortgage, and the mortgage delivered up to be cancelled.

The main question presented for consideration in this case is, whether a depositor in an insolvent savings bank, who is also a debtor of the institution for money borrowed, is entitled to offset the amount of his deposit against the money due on his obligation in the hands of the receiver?

The insolvency of the party against whom a set-off is claimed has long been considered sufficient ground for the allowance by a court of equity of set-off not within the statute. And under the provisions of the statute to prevent frauds by incorporated companies, the right of a debtor of an insolvent corporation to offset his claim against the receiver is recognized and established both at law and in equity.

But to entitle a party to such equitable relief in a case not provided for by the statute, his natural equity to have one claim compensate or discharge another must be superior to any equitable claim which can be urged in favor of those parties for whose benefit his claim to an equitable offset is resisted. *Waterman on Set-off*, § 439; *Holbrook v. Receivers*, 6 Pai. 231.

Applying this principle, our investigation is reduced to the single inquiry, is the equity of the appellant to off-set her deposit against the amount due on her bond and mortgage superior to the equity of the other depositors to have the mortgage debt collected and added to the general fund for the payment of all the depositors?

In the solution of this question regard must be had to the peculiar character of the corporation itself, and to the mutual relations of the depositors to each other and to the corporation. Savings banks differ widely in their objects, organization and character from ordinary banks and other joint stock companies. They have no capital stock. They are incorporated and organized not for the

advantage of the corporators, but solely for the benefit of the depositors. Their object, as stated in some of the early charters of this State, is to receive and safely invest the savings of mechanics, laborers, servants, minors and others, thus affording to such persons the advantages of security and interest for their money, and in this way ameliorating the condition of the poor and laboring classes by engendering habits of industry and frugality.

Properly organized and conducted, a savings bank is a *quasi* charitable and purely benevolent institution. Its only object, the safe keeping and provident investment of the funds of the depositors. The members of the corporation have no property interest in its funds, of which they are by law constituted the managers and guardians. The depositors, who alone are beneficially interested in the prosperity of the bank, have no voice in its management, nor even in the selection of the persons to whom its management is intrusted.

The assets of the bank are its invested funds, the common contributions of all the depositors, in which they all have a common interest. All the profits of the business are divided among the depositors or accumulated in a surplus fund for their joint benefit and greater security. As each depositor is entitled to his proportionate share of the profits, so in equity each should bear his proportionate share of the losses. So long as the bank is solvent no injury can arise from permitting a depositor to offset his deposit against his debt due to the bank, as no preference would be given in such case to one depositor over another. But in case of insolvency, to allow the set-off to be made would give an unjust preference to debtor depositors over all the others.

In a savings bank, the depositors bear, in great degree, the same relation to each other and to the property of the bank as do the stockholder in other monetary institutions. To the corporation itself they occupy the double relation of stockholders and creditors. In prosperity, they are the stockholders among whom the profits are divided. In case of insolvency, they are the creditors, and usually the only creditors, among whom the remaining assets are to be distributed. If the depositors were themselves made by law the corporators, empowered to elect managers from their own number, thus forming a mutual savings bank, the similarity would be more complete, and the natural equity of the depositors in their mutual relations to each other and the corporation more clearly apparent

The fact that the law for the greater security of the depositors and the more provident investment of their funds has wisely taken the management out of their control and placed it in the hands of disinterested corporators, cannot in equity change the relations of the depositors to each other, or affect their mutual interest in the common fund.

In some aspects the relations of the depositors to each other and the corporation are identical with those of the members of a mutual insurance company. In the one case, a deposit is made to obtain for the depositor a direct profit in the way of interest on the investment—in the other, to protect the members against a possible loss. In both cases the depositors or members have the same common interest in the accumulated assets of the corporation, the common fund to which they alike look for profit or for indemnity. In both they participate in the profits and bear their proportionate share of the losses—and from either, the depositor may at will, so long as the corporation remains solvent, withdraw his deposit, and thus sever his connection with the institution.

In *Hillier v. Allegheny Mutual Ins. Co.*, 3 Penn. St. 470, Chief Justice GIBSON adjudged that the loss of a member of a mutual insurance company could not be offset in an action on his premium note, when the funds of the company were not adequate to pay all losses, holding that to allow the set off would work injustice by enabling a member who stood in the double relation of debtor and creditor to get more than his share of the common fund, and that the proper plan of settling the affairs of an insolvent company of mutual insurers is to liquidate its means and responsibilities separately.

The New York Court of Appeals, in *Lawrence v. Nelson*, 21 N. Y. 158, held the same doctrine, and Chief Justice COMSTOCK, in a well-considered opinion, placed his decision upon the ground that the defendant, though both a creditor and a debtor of the institution, occupied still another relation, to wit, that of a member of the company and a contributor to the common fund paid in for the security of all the members—that like every other member of a moneyed or trading corporation, he took the chances both of gain and loss—and that in such case the rules of setoff between debtor and creditor have no application. The reasoning of the chief justice in that case applies equally to the one now under consideration.

The case of *Osborn v. Byrne*, 43 Conn. 155; s. c., 21 Am. Rep. 641, is directly in point, and expressly holds that a depositor in a savings bank, who is also a debtor to the bank as a borrower of its funds, cannot, upon the insolvency of the bank, off-set the amount of his deposit against his indebtedness. The result was reached upon a similar course of reasoning, viz.: That the debt owed by the depositor to the corporation belongs, in fact, to all the depositors, but neither the institution nor the other depositors owe him any thing more on his deposit than his just proportion of the assets owned by the bank.

In *Stockton v. Mechanics and Laborers' Savings Bank*, 5 Stew. Eq. 163, the same question now before the court was presented to the chancellor for his decision, upon the petition of the receiver for instructions, and in that case the chancellor decided that a depositor who is also a debtor to the bank, is not entitled to offset the amount of his deposit against his indebtedness. In the result reached by the chancellor I entirely concur, as the true rule in the case, sanctioned both by principle and authority.

The only case I have found holding a contrary doctrine is *Receiver of the New Amsterdam Savings Bank v. Tartter*, 54 How. Pr. 385; but upon examination that decision appears to be rested mainly on the general rules of set-off between debtor and creditor, without due regard to the peculiar character of the institution in process of liquidation.

It is however insisted, on the part of the appellant, that even if she cannot set off her deposit against her indebtedness, still she is entitled to have deducted from the mortgage debt so much of the consideration of the mortgage or the money borrowed thereon as never actually came to her hands but remained on deposit to her credit in the bank.

This contention is not tenable. Under the circumstances, the giving of the appellant credit for the amount of the loan on the books of the bank was equivalent to the actual payment of the money to her. From the date of the entry of the deposit it was subject to her check or order, and could have been drawn by her at any time. It so remained subject to her order for more than a year before the bank closed its doors, and during that time the appellant received regular dividends on the deposit. In ordinary banking operations, loans and discounts are usually placed to the credit of the customer, and are drawn out by check as needed.

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The same practice prevails to some extent in savings banks. In this case the deposit was made at the appellant's request, and it does not lie in her mouth to except to it.

It is further urged, on the part of the appellant, that the bank being in failing circumstances at the time of making the loan, the whole transaction was fraudulent and void as against her. It is not pretended that any inducements were held out by the managers or officers to induce the appellant to execute the bond and mortgage to the bank. The loan was made at the request of the appellant and for her accommodation. The making of a well-secured loan, if the funds were on hand for the purpose (which is not denied), even if the bank was in failing circumstances at the time, was a provident act, and for the benefit of all the depositors. The appellant herself could not have been prejudiced by it if she had withdrawn the money in a reasonable time. The charge either of actual or constructive fraud is not sustained by the allegations of the bill.

The decree of the Court of Chancery should be affirmed, with costs.

Judgment affirmed.

For affirmance — BEASLEY, C. J., DEPUE, PARKER, SCUDDER, VAN SYCKEL, CLEMENT, COLE, DODD, GREEN—9.

For reversal—DIXON, REED—2.

NOTE BY THE REPORTER.—In *Macungie Savings Bank v. Bastain*, Pennsylvania Supreme Court, March, 1881, it was held that a stockholder in an insolvent bank, who is also a depositor, cannot set off the amount of his deposit against the amount due for unpaid assessments on the stock subscription. The court said: "The capital stock of a corporation, whether fully paid or partly outstanding in the hands of subscribers thereto, is undoubtedly a trust fund for the benefit of its creditors. *Germantown Railway Co. v. Filer*, 10 P. F. Smith, 131; *Woods v. Dummer*, 3 Mason, 303; *Mann v. Pentz*, 3 Comst. 422. While such unpaid subscriptions pass, as assets, to the assignee under a voluntary assignment for the benefit of creditors, and the directors of the insolvent corporation may be required to make such calls on the subscribers to the stock as may be necessary to enable him to collect the same, they still retain the impress of trust funds and must go into the hands of the assignee intact, for the purpose of distribution among those for whose benefit they were intended. In this respect they differ from ordinary choses in action belonging to the assignor at the date of assignment. Against the latter, legitimate claims of set-off may exist, and what remains after deducting the same is all that can properly be considered a part of the trust fund."

"The demand against defendant in this case is not grounded on business transactions between him and the bank since its organization. It originated in the very creation of the bank, of which he was one of the incorporators. As a condition precedent to the granting of letters of incorporation, they were required by the sixth section of the charter 'to raise and form a capital of not less than five nor more than fifty thousand dollars in shares of twenty dollars each' for the security of depositors. The defendant subscribed for one hundred shares of the capital stock thus required and paid twenty-five per cent

thereof. By resolution of the board, after the assignment, the remaining seventy-five per cent was 'called in for liquidation of the indebtedness of the corporation.' He refused to pay in obedience to the call, and when suit was brought by the assignee in the name of the bank, to recover the balance due and owing by him on his subscription, his defense was that the bank was indebted to him as a depositor in a much larger sum, and therefore he should not be compelled to pay.

"If such a defense were entertained, the effect would be to withdraw from depositors and other creditors of the insolvent bank a portion of the very fund which was specially provided for the common benefit of all alike, and apply it to the sole benefit of the defendant, who, at best, has no better right thereto than other depositors. If every delinquent subscriber to the capital stock could thus pay his subscription, what would become of other depositors and creditors of the insolvent bank? It is not difficult to see what a perversion it would be of the trust fund, and to what gross injustice it would necessarily lead. From the fact that the directors called in the whole of the outstanding subscriptions for the purpose of liquidating the indebtedness of the bank, we have a right to assume that it is all required for that purpose. If defendant's indebtedness to the bank at the date of the assignment had been founded on an ordinary business transaction, such as making or indorsing a note, he might with some show of reason insist on setting up by way of defense a counter-claim as depositor. This would bring him, within the principle of *Jordan v. Sharlock*, 84 Penn. St. 323.

"In *Sawyer v. Hoag*, 17 Wall. 610, it is held that a stockholder indebted to an insolvent corporation for unpaid shares cannot set off against this trust fund for creditors a debt due him by the corporation; that the fund arising from such unpaid shares must be equally divided among all creditors. That case, it is true, arose under the National Bankrupt Act; but so far as the principle now under consideration is concerned, the right to set-off and rule of distribution, under that act, do not materially differ from our voluntary assignment law.

"The defense set up in this case derives no support from the principle involved in *Far's Appeal*, 8 Week. Notes, 556. The fund for distribution there included proceeds of outstanding subscriptions to capital stock of the Kutztown Savings Bank, which had been collected by the assignee. The whole fund was insufficient to pay depositors, who claimed that as a preferred class they were entitled to the fund for distribution to the exclusion of other creditors, and if not entitled to the entire fund, they had at least an exclusive right to that portion of it which represented capital, collected by the assignee; but it was held that the depositors as a class had no exclusive right to the whole or any particular portion of the fund."

In *Hobart v. Gould*, U. S. District Court, N. J., 8 Fed. Rep. 57, it was held as follows: Section 5151 of the Revised Statutes of the United States, among other things provides that the shareholders of every National banking association shall be held individually responsible for all contracts, etc., to the extent of the amount of their stock therein, at the par-value thereof, in addition to the amount invested in such shares. *Held*, that upon the insolvency of such a bank a shareholder who happens to be one of its creditors cannot cancel or diminish the assessment to which the provisions of this section make him liable, by offsetting his individual claim against it. The liability to be enforced against the shareholder is not a debt due to the bank, but it is a sum of money equal to the par value of his stock, payable by him to the receiver as an officer of the government by force of the law, and the assessment authorized and made by the comptroller. The effect of allowing such a set-off is to give the shareholder an advantage over other creditors. It practically pays his debt in full, and by leaving so much for others, diminishes his liability as a stockholder, which it was clearly the design of the law to impose. In *Attorney-General v. Mech. & Lab. Sav. Bank*, 5 Stew. 163, it was held that a depositor who borrowed money from the bank, secured by his note or mortgage, could not offset his debt against the amount of his deposit at the time when the decree of insolvency was made. In *Osborn v. Byrne*, 43 Conn. 155; S. C., 21 Am. Rep. 641, the Supreme Court of Connecticut, in answer to the petition of the receiver for an insolvent savings bank, praying for instructions, decided that the borrower of the funds of the corporation should not be allowed to offset his deposits against his indebtedness. See also, *Sawyer v. Hoag*, 17 Wall. 610; *Re Emptire City Bk.*, 18 N. Y. 199.

Haydock v. Haydock.

HAYDOCK V. HAYDOCK.

(7 Stew. [N. J. Eq.] 570.)

Fraud — constructive — husband and wife.

A gift by a husband, aged and weak in mind and body, to his wife, will not be sustained without affirmative proof that the act was intelligent and without undue influence, especially when it was obviously intended to operate as a will. (See note, p. 888.)

BILL to set aside a gift. The opinion states the case. The bill was sustained below.

J. R. English and *B. A. Vail*, for appellant.

Garret Berry and *J. Henry Stone*, for respondents.

REED, J. This bill is filed to set aside certain gifts made by Eden Haydock to his wife. Eden Haydock died April 25, 1879. The first gift was made February 24, 1879, of nine shares of the stock of the United New Jersey Railroad and Canal Companies and seven bonds of the city of Rahway. The second gift was made March 10, 1879, of a promissory note for \$5,000. Mr. Haydock had made a will eight years before, providing for his wife, which will was, at the time of his death, unrevoked.

The evidence in the case has impressed me with the conviction that at the time when these transfers were made the mind of the donor approached so closely to the line which defines the limit of legal mental capacity, that upon the ground of a want of such capacity I should incline to hold that these gifts were void.

The numerous instances of forgetfulness proven by the officers of the bank of which he was a director, and by artisans and business men with whom he had dealt, displays a mind upon which the business occurrences with which he was concerned left but a feeble impression.

It is of course entirely true that the memory may be quite imperfect and yet not make a state of mind which would avoid a disposition of property by gift or by testament. *Turner v. Cheesman*, 2 McCart. 243; *Stackhouse v. Horton*, 2 id. 202; *In re Vanderveer's Will*, 5 C. E. Gr. 561. Nevertheless a considerable degree of business recollection is an obvious prerequisite to such a disposition. An apprehension of the present status of a man's business affairs is

absolutely essential as a base for an intelligent shifting of their position. This involves of course the power to recall what has already been done. A person who is oblivious of a former disposition of his property is as unfit to make a subsequent disposition thereof as if he was under an insane delusion as to its extent and character. Now by the testimony of numerous witnesses, it appears that the mind of Mr. Haydock was so disorganized that the remembrance that he had done any of the recurring business acts which he had been accustomed to transact faded from his mind almost as soon as they were done, and he would, within a short period of time, offer to do the same act again and again. In the face of this evidence it would be difficult to conclude that at the time when he made these gifts he had such a recollection of the status of his property, particularly of the disposition which he had already made by the will of 1871, as to permit him to make a legal divestiture of it by gift. If the case stood upon this ground alone, I should incline to the opinion that a sufficient degree of capacity did not exist.

But if we admit that the donor was a person who possessed sufficient mental power to make a gift, yet I think it is upon the recipients of those gifts to show the fairness of the transaction. Here was a man of weak mind and feeble body. All the evidence in the cause shows that the wife was the one upon whom he naturally leaned. She watched his movements and cared for his wants, and he submitted himself to her control. She naturally and necessarily became the head of the house. While they so lived together, and while none but the wife and her brothers were about him, without the advice of disinterested counsellors, the old man made these gifts of which she was the recipient.

I take the rule to be settled that where a person, enfeebled in mind by disease or old age is so placed as to be likely to be subjected to the influence of another, and makes a voluntary disposition of property in favor of that person, the courts require proof of the fact that the donor understood the nature of the act, and that it was not done through the influence of the donee. *Huguenin v. Baseley*, 2 L. C. in Eq. (4th Am. ed.) notes, pp. 1183-1185, American notes, pp. 1192-1194.

The presumption against the validity of the gift is not limited to those instances where the relation of parent and child, guardian and ward, or husband and wife exists, but in every instance where

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the relation between donor and donee is one in which the latter has acquired a dominant position. The parent, by age, may come under the sway of his children. *Highberger v. Stiffler*, 21 Md. 338. And so, as in the present case, the husband may become the dependent of the wife, and their natural position become reversed.

The ecclesiastical courts have declared a rule of evidence in regard to wills executed by persons of weak mental condition. The presumption is that a person who executes a will knows the nature of its contents. Proof of its execution therefore is all that is required of the proponent. But if it appears that the testator was of a weak mind, and a bequest is made to a person who stood in a position which would have enabled the beneficiary to influence the act, the burden is shifted and a more rigid rule is enforced, and probate will not be granted unless the court be satisfied, by additional evidence, that the paper presented does really express the true will of the testator. *Taylor on Ev.*, § 160.

The presumption of undue influence, however, does not also arise from the same state of facts, in the case of a gift, because the rule in regard to what constitutes undue influence differs when applied to wills and when applied to gifts. *Boyse v. Rossborough*, 6 H. L. Cas. 149; *Parfitt v. Lawless*, L. R., 2 P. & D. 462.

The influence which is undue in cases of gifts *inter vivos* is very different from that which is required to set aside a will. In testamentary cases undue influence is always defined as coercion or fraud, but *inter vivos*, no such definition is applied. Where parties hold positions in which one is more or less dependent upon the other, courts of equity hold that the weaker party must be protected, and they set aside his gifts if he had not proper advice independently of the other. *Huguenin v. Baseley*, *supra*, notes, p. 1271.

In the present case, these gifts, while gifts *inter vivos*, were undoubtedly intended by the donee to operate as a testamentary disposition of the donor's property. It is clear that the physical condition of the donor was critical, and his days brief in number. The presence of Mr. Anderson and the talk with him about drawing a will, and also the conversation detailed by Bayright, which he says he had with Mr. Haydock in the garden, point to the conclusion that it was supposed that the life of the donor would be brief, and that some disposition of his property, in view of his death, was requisite. For some reason the will was never drawn, and it is transparent that the gifts were executed to fill the place of a will.

Now it seems to me, that where it is apparent that a gift is made to accomplish the purpose of a will, to operate as such an instrument, without being surrounded by the formal guards which the statute has provided for the execution of a will, it raises an additional reason why a gift like this should be scanned with circumspection, and why the donee should clearly and convincingly show the validity of its execution.

I entirely concur with the vice-chancellor, that instead of this being shown, it appears that the donor was surrounded with dominant influences which favored the donations, and the presumption that they actually fostered the act is supported by all the testimony in the case bearing upon their conduct toward the donor.

The decree should be affirmed, with costs.

Decree affirmed.

For affirmance — BEASLEY, C. J., DIXON, KNAPP, MAGIE, REED, SCUDDER, VAN SYCKEL, CLEMENT, COLE, GREEN, WHITAKER — 11.

For reversal — PARKER — 1.

Absent — DONN, LATHROP — 2.

NOTE BY THE REPORTER—In *Bainbridge v. Brown*, 41 L. T. Rep. (N. S.) 705, it was held as follows: Where young persons who have recently attained their majority, and are so situated as to be subject to the exercise of undue influence, have consented to make their property responsible for the debts of the person who was in a position to exercise such undue influence, the burden of proof that there was no exercise of undue influence rests upon the person in a position to exercise such influence, and upon persons claiming under him as volunteers, and upon persons claiming under him with notice of the relation between the parties having been such that the exercise of influence would be inferred by the court, and as against all such persons concessions alleged to have been exacted by such undue influence will be set aside, unless the burden of proof is discharged. The burden of proof however does not rest upon any other person interested in such concessions than those mentioned, so that as against persons who without notice have given valuable consideration for the concessions alleged to be exacted, the burden lies upon the persons alleging undue influence to prove that it was in fact exercised. Three young persons, aged respectively twenty-five, twenty-four and twenty-two, who were resident under their father's roof and emancipated from his control, executed a deed by which they made themselves liable for the interest on certain mortgage debts of their father to his mortgagees, and charged their reversionary interests under their parents' marriage settlement for that purpose, and gave the mortgagees a power of sale over such reversionary interests. In consideration of receiving the interest payable under the deed, the mortgagees agreed to reduce the rate of interest payable on their mortgages. The children brought an action to set aside the deed as against their father and his mortgagees, on the ground of undue influence exercised by their father. *Held*, that as against the father the burden of proof lay on him, and that as he had not discharged it, the deed must be set aside as against him; but that as against the mortgagees the burden of proof lay on the plaintiffs, that they had not discharged it, and that the deed could therefore not be set aside as against the mortgagees. *Maitland v. Irving*, 8 L. T. Rep. 312; *Archer v. Hudson*, 7 Beav. 551; *Berthou v. Dawson*, 12 L. T. Rep. (N. S.) 108; *Kempson v. Ashbet*, L. R. 9 Ch. 15.

See note, 33 Am. Rep. 736.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

EATON, COLE & BURNHAM COMPANY V. AVERY.

(88 N. Y. 81.)

Fraud — statements to mercantile agency.

Where a member of a firm makes false and fraudulent statements to a mercantile agency as to the amount of capital invested in the business, designing that such statements shall be communicated to persons inquiring of the agency as to the pecuniary responsibility of the firm, and thus enable the firm to procure a credit to which they would otherwise not be entitled, an action of deceit lies against him in favor of one who has been deceived and injured by such representations.

ACTION for deceit. The opinion states the facts. The plaintiff had judgment below.

John H. Bergen, for appellant. The facts and circumstances should have excited suspicion and led to inquiry. *Williamson v. Brown*, 15 N. Y. 354; *Herrlich v. Brennan*, 11 Hun, 194. Plaintiff could not maintain this action even if it had relied on the report. *Cooley on Torts*, pp. 476, 487, 493, 496; *Long v. Warren*, 68 N. Y.

Eaton, Cole & Burnham Company v. Avery.

426; *Peck v. Gurney*, 8 Moak Eng. 1; *Barry v. Croskey*, 2 J. & H. 117, 118, 123; *Langridge v. Levy*, 4 M. & W. 337.

John L. Hill, for respondent.

RAPALLO, J. This is an action for deceit, in obtaining the sale and delivery of goods to the firm of Avery & Riggins, by means of false representations made by the defendant as to the pecuniary condition of his firm. The representations charged were not made directly by the defendant to the plaintiff, but are alleged to have been made by him to a mercantile agency (Dun, Barlow & Co.), or its agent, and by it communicated to the plaintiff, who claims that it delivered the goods to Avery & Riggins on credit, on the faith of such representations. The counsel for the defendant contends that the plaintiff cannot maintain an action against the defendant for false representations made by him to Dun, Barlow & Co., or its agent, and that such representations, assuming them to have been made, are not sufficiently connected with the dealing between the defendant and the plaintiff to enable the latter to recover by reason thereof. On this point we are of opinion that the law was correctly stated by the learned judge before whom the trial was had, in his charge to the jury, wherein he instructed them that if the defendant, when he was called upon by the agent of Dun, Barlow & Co., made the statements alleged in the complaint as to the capital of the firm of Avery & Riggins, and they were false, and so known to be by the defendant, and were made with the intent that they should be communicated to and believed by persons interested in ascertaining the pecuniary responsibility of the firm, and with intent to procure credit and defraud such persons thereby, and such statements were communicated to the plaintiff and relied upon by it, and the alleged sale was procured thereby, the plaintiff was entitled to recover. The rule thus laid down accords with the principle of adjudications in analogous cases, in which it has been held that it is not essential that a representation should be addressed directly to the party who seeks a remedy for having been deceived and defrauded by means thereof. *Cazeaux v. Mali*, 25 Barb. 578; *Newbery v. Garland*, 31 id. 121; *Bruff v. Mali*, 36 N. Y. 200; *Morgan v. Skiddy*, 62 id. 319; *Commonwealth v. Call*, 21 Pick. 515, 523; *Commonwealth v. Harley*, 7 Metc. 462. The principle of these cases is peculiarly applicable to the case of statements made to mercantile

agencies. Proof was given on the trial as to the business and office of these agencies, but they are so well known, and have been so often the subject of discussion in adjudicated cases, that the courts can take judicial notice of them. Their business is to collect information as to the circumstances, standing and pecuniary ability of merchants and dealers throughout the country, and keeps accounts thereof, so that the subscribers to the agencies, when applied to by a customer to sell goods to him on credit, may by resorting to the agency or to the lists which it publishes, ascertain the standing and responsibility of the customer to whom it is proposed to extend credit. A person furnishing information to such an agency in relation to his own circumstances, means and pecuniary responsibility, can have no other motive in so doing than to enable the agency to communicate such information to persons who may be interested in obtaining it, for their guidance in giving credit to the party; and if a merchant furnishes to such an agency a willfully false statement of his circumstances or pecuniary ability, with intent to obtain a standing and credit to which he knows that he is not justly entitled, and thus to defraud whoever may resort to the agency, and in reliance upon the false information there lodged, extend a credit to him, there is no reason why his liability to any party defrauded by those means should not be the same as if he had made the false representation directly to the party injured.

The counsel for the appellant is undoubtedly right in his general proposition that a false representation, made to one person cannot give a right of action to another to whom it may be communicated, and who acts in reliance upon its truth. If A. casually or from vanity makes a false or exaggerated statement of his pecuniary means to B., or even if he does so with intent to deceive and defraud B., and B. communicates the statement to C. who acts upon it, A. cannot be held as for a false representation to C. But if A. makes the statement to B. for the purpose of being communicated to C., or intending that it shall reach and influence him, he can be so held. In *Commonwealth v. Call*, 21 Pick. 515, the court say on this point, at page 523, that the representation was intended to reach P. and operate upon his mind; that it did reach him, and produce the desired effect upon him, and that it was immaterial whether it passed through a direct or circuitous channel.

In *Commonwealth v. Harley*, 7 Metc. 462, the prisoner was indicted for obtaining goods by false pretenses from G. B. & Co.

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The representations were made by one Cameron, in the absence of the prisoner Harley, to a clerk of G. B. & Co. who communicated them to a member of the firm. But there was evidence that they were made by Cameron with the approbation and direction of Harley, and these facts were held sufficient to sustain a conviction. Neither is it necessary that there should be an intent to defraud any particular person. Should A. make a false statement of his affairs to B. and then publicly hold out B. as his reference, can it be doubted that he would be bound by the communication of his statement by B. to any person who might inquire of him in consequence of this reference? That case differs from the present one only in the fact that here there was no express invitation to the public to call upon Dun, Barlow & Co. for information. But the defendant knew that they were a mercantile agency whose business it was to give information as to the standing and means of dealers, and that it was resorted to by merchants to obtain such information. By making a statement of the financial condition of his firm to such an agency he virtually instructed it what to say if inquired of. Can it make any difference whether he spontaneously went to the agency to furnish the information or whether he gave it on their application? He must have known that the object of the inquiry was not to satisfy mere curiosity, but to enable the agency to give information upon which persons applying for it might act, in dealing with the defendant's firm.

The case is a new one in its facts, but the principles by which it should be governed are well established.

[Omitting questions of fact.]

The judgment should be affirmed.

Judgment affirmed.

All concur.

 PECKHAM V. VAN WAGENEN.

(83 N. Y. 40.)

Corporation — action between stockholders for dividends.

A stockholder, who alleges that his right to participate in a dividend declared by the corporation has been wrongfully denied by it, cannot maintain an action in the first instance for money had and received against another stockholder who was participated in such dividend.

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ACTION for money had and received. The opinion states the case. The defendant had judgment below.

Henry L. Burnett, for appellant. Plaintiff was entitled to share equally in the dividend with the other stockholders. *Jones v. Terre Haute & Richmond R. R. Co.*, 29 Barb. 353; s. c., 57 N. Y. 196; *Luling v. Atlantic Mut. Ins. Co.*, 45 Barb. 510; *Harrison v. Mexican R. R., L. R.*, 19 Eq. 358; *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159, 179; *Foote*, 22 Pick. 299, 304; *Granger v. Bassett*, 98 Mass. 462; *March v. Eastern R. Co.*, 43 N. H. 515; *Phelps v. Farmers' Bank*, 26 Conn. 269; *Reese v. Bank, etc.*, 31 Penn. St. 78; *Ryder v. Alton, etc., R. R. Co.*, 13 Ill. 516, 520. As soon as the dividend was declared, plaintiff's proportionate share became absolutely her own property. *Jones v. Terre H., etc., R. R.*, 57 N. Y. 196, 207; *Hyatt v. Allen*, 56 id. 553, 557; s. c. 15 Am. Rep. 449; *King v. Paterson, etc., R. R. Co.*, 29 N. J. L. 82; *Carpenter v. N. Y. & N. H. R. R.*, 5 Abb. Pr. 277; *Hill v. Newichawanick Co.*, 8 Hun, 459; *Beers v. Bridgeport Spring Co.*, 42 Conn. 17; *March v. Eastern R. R. Co.*, 43 N. H. 515; *Le Roy v. Globe Ins. Co.*, 2 Edw. Ch. 657; *Matter of Le Blanc*, 14 Hun, 8; 75 N. Y. 598; *Lowene v. Fire Ins. Co.*, 6 Pai. 482; *King v. Paterson, etc., R. R.*, 29 N. J. 88; *Hodsdon v. Copeland*, 16 Me. 314. An action at law will lie against defendant for the recovery of plaintiff's property received by him. *Kane v. Bloodgood*, 7 Johns. Ch. 90; 11 Am. Dec. 417; *King v. Paterson, etc., R. R. Co.*, 29 N. J. 506; *Le Roy v. Globe Ins. Co.*, 2 Edw. Ch. 651; *Matter of Le Blanc*, 14 Hun, 8; s. c., 75 N. Y. 598; *Moses v. Macfarlan*, 2 Burr. 1010; *Eddy v. Smith*, 13 Wend. 489; *Buel v. Boughton*, 2 Den. 91; *Barnes v. Johnson*, 84 Ill. 95; *Hathaway v. Town of C.*, 62 N. Y. 447; *Causidore v. Beers*, 1 Abb. Ct. App. Dec. 333, 336; *Mason v. Waite*, 17 Mass. 563; *Pierce v. Crafts*, 12 Johns. 90; *Cary v. Curtis*, 3 How. 247; *Tugman v. Nat'l Steamship Co.*, 76 N. Y. 207, 210; *Ela v. Express Co.*, 29 Wis. 611; s. c. 9 Am. Rep. 619; *Knapp v. Hobbs*, 50 N. H. 476; *Platt v. Stout*, 14 Abb. Pr. 178; *Johnson v. First Nat'l Bank*, 6 Hun, 124; 68 N. Y. 616; *Hodsdon v. Copeland*, 16 Me. 314.

John E. Burrill, for respondent.

RAPALLO, J. The plaintiff claimed that she was entitled to thirty shares of \$100 each, of the capital stock of the New York &

Fort Lee Railroad Company, by virtue of a payment of \$3,000 made by her on the 6th of November, 1863, to the treasurer *pro tem.* of the company, upon which payment such treasurer delivered to her a certificate to the effect that she had subscribed for said shares and had paid \$3,000 therefor, and would thereby be entitled to said shares on complying with the conditions of the charter, which certificate had been lost. No certificate of the stock had ever been issued to her, but on the contrary, her demand for one was not complied with, nor was it shown that she was credited with the shares on the stock ledger of the company.

In December, 1871, there was received by the company a large amount in cash and securities for a lease of its road. A resolution was on the 15th of December, 1871, adopted by the board of directors authorizing a dividend of the cash which had been so received among the stockholders of the company, and on the 19th of December, 1871, a further resolution was adopted authorizing the division of the securities *pro rata* among such stockholders.

The plaintiff claimed that in paying the cash dividend, and in distributing the securities, the company ignored her rights as a stockholder, and paid the whole of the cash dividend, and distributed all the securities, to and among other persons who assumed to own and hold all of the capital stock of the company, whereby they received a larger proportion of said dividends than that to which they would have been entitled if the shares claimed by her had been taken into the account. That in this way the defendant, who was one of the shareholders recognized by the company, received a dividend upon his shares exceeding by the sum of \$14,000 and upwards, in cash and securities, the proportion to which he would have been entitled had the plaintiff's shares participated, and that she was entitled to recover this sum of the defendant as money had and received to her use.

The defendant disputed the claim of the plaintiff to the shares in question, claiming that they were the same which had been surrendered long before the making of the dividends, and moved for a nonsuit on the ground that the plaintiff had shown no title to the shares claimed by her; also on the ground, that even if she had shown herself entitled to the shares, this action could not be maintained. The court dismissed the complaint without specifying upon which of these grounds it based its decision.

We are of opinion that the complaint was properly dismissed on

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the second ground stated, and it is therefore not necessary to consider whether enough was shown to require the submission to the jury of the question of the plaintiff's ownership of the shares. The defendant, in receiving the dividends paid to him, did not act, or assume to act, in behalf of the plaintiff, or to represent the shares claimed by her, or to receive any dividends payable thereon. He received only the dividends declared and admitted by the company to be due him on his own shares, his title to which shares is not disputed, and in which the plaintiff claims no interest. The amount which he received was paid to him in his own right and was conceded by the company to be due to him. There was no privity between him and the plaintiff. The complaint alleges that the company, in making the dividend and distributing the securities, disregarded and ignored the rights of the plaintiff. Her remedy, if she was wrongfully excluded from the rights of a stockholder, was against the company, and she was not entitled to follow the assets of the company into the hands of parties to whom it had made payments, and to recover her dividends from them, until at least she had established her right as a creditor of the company, and exhausted her legal remedies against it. She could not, in the first instance, resort to a common-law action against the persons whom the company had recognized as its only stockholders, to recover a portion of the dividends admitted to be due and actually paid to them in their own right, and try her title to the shares in actions against them. As an action for money had and received, the case falls directly within the principle of *Butterworth v. Gould*, 41 N. Y. 450, even if the plaintiff had established a clear legal title to the shares, and a right of action against the company for the dividends thereon. The defendant received the dividends, claiming them as his own, and under no pretense of authority from the plaintiff, and the payment was made to him in recognition of his title thereto as his own, and did not purport to discharge the company from its liability, if any, to the plaintiff, and the case cited as well as the prior case of *Patrick v. Metcalf*, 37 N. Y. 332, holds in express terms that under such circumstances there is no trust and no implied promise to pay the money to the plaintiff. It cannot be said that the title to the money or securities distributed was in the plaintiff, for in the first place, she was not an admitted stockholder of the company; but if she had been she had no title to the legal assets which would enable her to follow them

into the hands of third persons. The title to them was in the corporation until they were distributed, and then it passed to the distributees. If she has any claim it is against the company for not setting off to her the proportion to which she claims to have been entitled, or for not recognizing her as a stockholder. There is no precedent for an action like the present, though there have been many cases in which corporations have wrongfully refused to recognize the rights of persons claiming to be stockholders. If the plaintiff had been an admitted stockholder, and a dividend had been declared upon her shares with the others, and the amount of the dividend had been placed in the hands of a third party for distribution, the case would be within some of the authorities cited, in which it was held that a trust was created in favor of the stockholder to whom the dividends were due, and that she could follow the fund in the hands of the party who had thus received it, or his transferee. *Le Roy v. Globe Ins. Co.*, 2 Edw. Ch. 657; *In re Le Blanc*, 75 N. Y. 598. But the distinction between those cases and the present is very clear. The company does not appear to have declared any dividend upon the shares claimed by the plaintiff, nor to have paid any thing to the defendant as a dividend upon those shares, or for the purpose of being paid to the holder of such shares, but as alleged in the complaint, to have ignored that the shares were outstanding, and the claim of the plaintiff thereto.

The judgment should be affirmed.

Judgment affirmed.

All concur.

ZIMMERMAN V. ERHARD.

(83 N. Y. 74)

Statutory construction — fictitious names in firms — “ & Co.” representing wife.

A statute prohibiting the use of names in firms of persons not interested, and requiring that “ & Co.” shall represent an actual partner, does not apply to a case where those words represented the wife of the person whose full name appears.

ACTION for goods sold and delivered. The opinion states the facts. The plaintiff had judgment below.

Zimmerman v. Erhard.

Edward Van Ness, for appellants. There cannot be a partnership between husband and wife, and the use of her name is a fiction in law. *Laws of 1833*, chap. 281, § 1; *Swords v. Owen*, 43 How. Pr. 176; *In re Boyle*, 1 Tuck. 4; *In re Schlichter*, B. R. 337; *Manhattan Bank v. Thompson*, 58 N. Y. 82; *Owen v. Cawley*, 36 id. 600; *Gosman v. Cruger*, 69 id. 87; *Manchester v. Sahler*, 47 Barb. 155; *Curtis v. Brooks*, 37 id. 476; *Pars. on Part.* 27; *Bradstreet v. Baer*, 41 Md. 23; *Losel v. Davidson*, 3 Allen, 131; *White v. Wage*, 25 N. Y. 328, 333; *Winans v. Peebles*, 32 id. 423; *Curtis v. Brooks*, 37 Barb. 476; *Ford v. Davidson*, 3 Allen, 131; *Scudder v. Gori*, 18 Abb. Pr. 223; *Kelso v. Tubor*, 52 Barb. 125; *Loomis v. Ruck*, 56 N. Y. 462, 464, 465; *Broome v. Taylor*, 76 id. 564; *Porter v. Mount*, 45 Barb. 423; *Tisdale v. Jones*, 38 id. 523; *Wright v. Saddler*, 20 N. Y. 323; *Montgomery v. Sprinkle*, 31 Ind. 113; *In re Kinkead*, 3 Biss. 405; *Perkins v. Perkins*, 7 Lans. 19.

Thomas F. Cator, for respondents.

MILLER, J. The defendants interpose, as a defense to the plaintiffs' demand, that the plaintiffs were not copartners, and that the plaintiff John Zimmerman did business under the name of "J. Zimmerman & Co.;" that the words "& Co." do not represent any real party, and that the same are used in violation of chapter 281, Session Laws of 1833, which provides that "no person shall transact business in the name of a partner not interested in his firm; and when the designation 'and Company,' or '& Co,' is used, it shall represent an actual partner or partners." The defense rests upon the supposition that Mary Zimmerman, the wife of the plaintiff John Zimmerman, was intended by the words "& Co." and that no partnership can exist between husband and wife, and therefore the use of the words was illegal and a violation of the statute. That plaintiffs were husband and wife is only established by the testimony of John Zimmerman that the firm was composed of himself and his wife, Mary Zimmerman. Whether Mary was the wife of John Zimmerman at the time of the sale is not shown; nor is there any finding or request to find to that effect. But assuming the proof on this subject was sufficient, we think the use of the words "& Co." for the name of the wife was not a violation of the statute cited.

The provision in question is highly penal and will not be exten-

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ded. It was intended to prevent the use of the name of a person not interested in the firm, and thus inducing a false credit to which it was not entitled. *Wood v. Erie Ry. Co.*, 72 N. Y. 196, 198; s. c. 28 Am. Rep. 125. It does not apply to, and is not intended to include the use of a real name of an actual partner, even although such a partner was under a disability at the time. The use therefore of the name of a *feme covert*, as one of the firm, where there was no intention to impose upon the public by obtaining undue credit, cannot be regarded as a violation of either the letter or the spirit of the statute cited. The name used in this case was a real one, and the words "& Co." were in no sense fictitious or unlawful in the meaning of the statute. Without considering the question whether a married woman can be a partner of her husband, it is quite obvious that such disability is not available to the defendants in this action, upon the ground set up in the defendant's answer that the words "& Co." did not represent a real party, and the answer referred to constitutes no defense to the plaintiff's demand.

[Omitting minor matter.]

There was no error, and the judgment should be affirmed.

Judgment affirmed.

All concur.

HARRIS V. TUMBRIDGE.

(83 N. Y. 92.)

Contract — stock option or "straddle" — wager.

The plaintiff, through the defendant, a stock broker, purchased a "straddle" or the option to demand of the seller, or to require him to take, at a stated price, a certain quantity of a specified stock, within a specified number of days. She was induced to this by defendant's printed circular, explaining the "straddle," offering himself to purchase upon his own selection, upon payment of a specified sum, and guaranteeing eight per cent fluctuation in the stock value during the time, or in default to refund the amount less his commissions. The plaintiff accordingly authorized him to select and purchase for her. He did so, and next day sold the stock "short," to her damages. *Held*, that these facts authorized a verdict for damages, in an action of negligence, in her favor.

ACTION of negligence. The opinion states the case. The plaintiff had judgment below.

Harris v. Tumbridge.

Brewster Kissam, for appellant.*Frederic A. Ward*, for respondent.

FINCH, J. The plaintiff in this case, a lady living in the country, ventured upon a speculation in stocks, and lost her money. She sued her broker, and was awarded damages by a jury, upon whose verdict the judgment was entered from which this appeal is taken.

The plaintiff bought, through the agency of defendant, a stock option or privilege, known in the language of brokers as a "straddle." The word, if not elegant, is at least expressive. It means the double privilege of a "put" and "call;" and secures to the holder the right to demand of the seller at a certain price within a certain time a certain number of shares of specified stock, or to require him to take, at the same price within the same time, the same shares of stock. The continuance of the option is fixed by the agreement, and in this case was for sixty days. The value of a "straddle," it is proven, depends upon the fluctuations of the stock selected. The wider the range of these fluctuations, whether up or down, the greater the amount which may be realized; and of course the longer the option continues the greater the chance of such fluctuations during the period. The plaintiff swears that she was led into the purchase of the "straddle" in question by several printed circulars of the defendant, which she produced. Of course they point out an easy and rapid road to wealth for any one who is careful in his choice of a broker, but the material point in them is that they describe a "straddle," explain its dependence for success upon the fluctuations of the selected stock, and offer to any one who will purchase a sixty-day "straddle" of the defendant's selection, paying therefor \$400, and \$25 more for commission, a guaranty that the aggregate fluctuation of the stock during the pendency of the contract will amount to eight per cent; and further promise that if the stock does not move to that extent the cost of the contract, less commissions, shall be refunded. The plaintiff probably did not quite understand the proposition, but thinking it entirely safe, borrowed the necessary \$425 with which to make the venture. She inclosed the draft to Tumbridge & Co. to invest in a sixty-day straddle-contract under their guaranty. She adds that she had invested twice before and lost her money. Made cautious by that ill fortune, she expressly adds: "If I do not understand this new arrangement

of yours aright, and there is any danger whatever that I will lose the \$400, then do not invest it at all until you can inform me, for I have borrowed the amount from bank, and would not be able to meet payment as soon as due." The defendant answered, acknowledging the receipt of the check, and saying: "We do not see how you can lose any thing on such an arrangement as we propose," and then selecting Lake Shore or Western Union stock for the venture, he gave her a choice between the two. On the 13th of September the plaintiff answered by a telegram, "I leave the situation with you," and on the next day the defendants wrote her that they had purchased for her account a straddle-contract on 100 shares Lake Shore at 62 $\frac{1}{4}$. On the next day after the defendant sold the stock "short" against the "straddle," and this act of his is assailed on the part of the plaintiff as unauthorized, negligent and unskillful, and defended on the part of the broker as prudent and customary, and ratified by his principal. The result of the short sale was represented by the defendant to have been unfortunate, and left the plaintiff with her money gone and owing the broker \$9.

It is made very apparent by the evidence that the only right of the defendant, as the agent of the plaintiff, after the purchase for her of the "straddle" contract, was to exercise the option secured by it at such time within the sixty days as she might direct, or if no instructions were given, and the "situation" was left to his care, then to exercise that option at such time within the sixty days as taking into view the state of the market appeared to be prudent and proper. In no event had he the right to involve the plaintiff in another and distinct speculation, having no necessary connection with the "straddle" contract, except that as the evidence seems to show, it had the effect to "neutralize" one part of that contract. The defendant puts his right to make the short sale complained of upon several grounds. The first is, that he was authorized, by the terms of the contract, holding the "straddle" as margin, to operate for the plaintiff in the purchase and sale of the selected stock. The arrangement between the parties is contained wholly in their correspondence. That does not at all justify such an inference. The defendant himself did not so understand the contract. In his letter announcing his action in the purchase of the "straddle" he says, "which contract we hold for closing, and in the absence of any further instructions from you, we will exercise our best judgment in closing at the most favorable time." There is here no assumption of a

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right to operate in stocks, holding the "straddle" as margin, but a distinct recognition of his real duty. That was, in the absence of specific instructions, to close the option held for the plaintiff at what seemed the most favorable time.

[Omitting a question upon the pleadings.]

With this understanding of the contract between the parties, and their relative rights and duties, we are prepared to test the objections made to the recovery.

It is urged that the question of authority to make the "short" sale should not have been submitted to the jury, and that they should have been directed, under the issues joined, not to consider it. But the question of authority was raised by the defendant himself. His sale of the stock "short" within a single day of the purchase of the "straddle" was assailed as negligent. He claimed in his defense that the act was within his authority and was ratified by the plaintiff. The question thus raised became a material issue in the case, and bore directly upon the ultimate question of defendant's diligence or negligence in the performance of his duty.

He complains that there was no evidence of such negligence, or of any want of skill or care on his part, and therefore that question should not have been submitted to the jury. But it is clear that there was such evidence. The plain object of the "straddle" was to secure the benefit of the possible fluctuations of sixty days. His own description of the character of such a privilege and of the greater safety of such a double option, and his guaranty of eight per cent of aggregate fluctuations, all indicated that as the essential merit of the "straddle." This contemplated benefit, the possibility and probability of profit from it, the defendant threw away. He waited but a single day. He at once neutralized one-half of the option, and by so doing increased the chances of loss. He did this without plaintiff's authority and to her manifest disadvantage. The course of the stock market through the sixty days apparently shows that if he had reasonably waited its development and then exercised the option secured by the "straddle," he might have closed the contract when the stock had sufficiently advanced to have returned the plaintiff her original investment and a fair profit beside. Experts, however, familiar with the stock market, testified on both sides, and the question of negligence and want of skill thus raised was peculiarly within the province of the jury, and their conclusion we cannot review.

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[Omitting the question of ratification.]

It is next argued that this was a gambling transaction, and as such prohibited by statute. It may have been, but there is no proof that it was, and no such defense was pleaded. The contract was not of necessity a wager contract. That it might have been does not at all dispense with the necessity of proving that it was. The evidence now relied on is contained in a description of a "straddle" given by the witness Landon. He describes it first, and then adds, "in other words it is a bet that the stock will fluctuate so much." He speaks of a "straddle" generally. He does not speak of the actual transaction between these parties at all. As to that there is no proof of its character as a mere wager. We cannot supply it by suspicion or infer it from the making of a contract not necessarily within the prohibition.

[Omitting questions of damages and usage.]

The judgment should be affirmed with costs.

Judgment affirmed.

All concur.

HORN V. TOWN OF NEW LOTS.

(88 N. Y. 100.)

Assessment -- action to recover money paid on illegal.

In an action to recover money paid to a town on an illegal and unconstitutional assessment, it is not necessary that the assessment shall have been judicially vacated, if the illegality appears on the face of the proceedings.

ACTION to recover money paid on an assessment. The opinion states the case. The defendant had judgment below.

J. F. Mosher, for appellant.

Frank Crooke, for respondent.

FOLGER, C. J. This case comes here on appeal from a judgment sustaining a demurrer to the complaint. The ground of demurrer is that the facts stated in the complaint do not show a

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cause of action against the defendant. The action may be called one for money had and received by the defendant to the use of the plaintiff. The averments of the complaint being taken as true, it appears that there was a sum of money belonging to the plaintiff in the official custody of the county clerk of Kings county. The money was the surplus arising upon the foreclosure of a mortgage upon certain lands in the town of New Lots, devised to the plaintiff, which mortgage was laid upon them by the deviser of the plaintiff; it was foreclosed after his death. An assessment had been in form laid upon these lands, to raise money to pay the expenses of a local improvement, by which they were benefited, or supposed to be. This assessment was laid in pursuance of acts of the legislature. Laws of 1869, chap. 217, §4, vol. 1, p. 407; Laws of 1870, chap. 619, § 3; vol. 2, p. 1436. Those assessments were unconstitutional and void, and the assessment was of no validity or effect. *Stuart v. Palmer*, 74 N. Y. 183. The board of supervisors of Kings county, supposing the legislative acts to be valid in that regard, levied a tax upon the premises to pay the assessment, and issued their warrant to the collector of the town of New Lots for collection of it. He levied upon and took the money from the custody of the clerk and paid it to the county treasurer of Kings county, to the credit of the town of New Lots on account of the assessments. In the progress of the local improvement and by mandate and authority of acts above cited, bonds of the town of New Lots had been issued to provide for the payment of the expenses of the improvement, in anticipation of the collection of the assessments therefor. It is alleged that they were valid obligations of the town. The money paid to the county treasurer was applied to the payment of these bonds. It is not averred how or by whom the money was thus applied. It is also averred that the town of New Lots had wrongfully taken and received, without the knowledge or consent of the plaintiff, that money, the property of the plaintiff, and applied it to its own use, and had wholly failed and neglected to pay over the same to the plaintiff.

We think that it cannot be successfully denied that the plaintiff had a right to recover against some one for the money. It was hers as being the result of a conversion by judicial proceedings into personal property of real estate devised to her. It was taken from her, she neither willing nor consenting thereto, without lawful right. Though taken under the formality of law, the legislative

acts were void and the assessment invalid. But we are not now concerned to determine against whom of those other than the defendant, who touched her money, she might properly have brought the action. The question here is, can she maintain it against the town of New Lots? The question was disposed of in the learned court below against her, on the ground that the allegation in her complaint, that the law authorizing the assessment was unconstitutional and void, is not tantamount to an averment that it was void on its face; that she was legally bound to pay the assessment until it was vacated; and that her only remedy is a reversal of the adjudication by which the assessment was laid. But we have held in *Stuart v. Palmer*, *supra*, not only that this assessment was unconstitutional and void, but that its invalidity must at once appear whenever it is brought into a judicial focus; and that for that reason a suit in equity to vacate it as a cloud upon title cannot be maintained. There are judgments, that to recover back money paid or taken on an illegal assessment, there must first be a vacating of the assessment by judicial power. *Peysner v. Mayor*, 70 N. Y. 497; s. c., 26 Am. Rep. 624; see also, *In re Lima*, 77 N. Y. 170; *Wilkes v. Mayor*, 79 id. 621. But they apply only in cases of assessments where the invalidity is so to speak latent, and does not appear upon the proof that must be made to sustain proceedings under them. *Mark v. City of Brooklyn*, 59 N. Y. 280.

The defendant urges various reasons why the action may not be maintained against it; that the town was only the enforced agent of the State in issuing the bonds and laying the assessment to provide for the payment of them, and had no discretion or interest or voluntary act in the matter; that if the assessment was invalid the town bonds were also so, as they were inseparable parts of one scheme. But these reasons are not good. So towns were enforced agents in raising men for the Union army in the late rebellion, and in issuing their obligations for bounties, yet they were held liable, and the bonds declared to be town charges. *Marsh v. Little Valley*, 64 N. Y. 112. The bonds issued for, or in the name of the town, may be good though the assessment be invalid; the legislature had power to direct the improvement, and to put the burden of providing the means therefor upon the town. *People ex rel. v. Flagg*, 46 N. Y. 401; and a contract made under lawful power is not avoided by the illegality of provisions in the same act for the levying of an assessment. *Moore v. Mayor*, 73 N. Y. 238; s. c. 29 Am. Rep. 134.

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The defendant also urges that the money never came into the hands of the town. There is an averment in the complaint, as we have stated, that the defendant had wrongfully taken and received the money, and applied the same to its own use. Now this averment, if it were against a natural person, or against an artificial entity, capable of making money and applying it to its own use, would be sufficient with the other facts alleged, to show a cause of action. Nor must it be construed in any other way, because of the character and capacity of the defendant against whom it is asserted. We know, to be sure, that a town, by the laws of the State, is not a full corporated body; that it has no treasury or treasurer; that nearly all acts done for it and in its name are by certain officers whose offices are created by statute, such as supervisor, clerk, commissioners of highways, overseers of the poor and the like, who receive the moneys raised for the public purposes of the town, and disburse them for the public good or to meet public duties. But an averment that the town of New Lots took and received this money and applied it to its own use, is of more effect than to say that some officer of that town, supervisor, commissioner or the like, took, received and applied it. A receipt by any of those authorities of the town, and an application by them to the purposes of the town might not raise a liability against the town as a political division of the State. They, it is said, do not stand for the town. Their functions are prescribed by statute. They receive and pay out money as officers, in the performance of their own official duty. The town may not be liable for the receipt, nor for the failure to pay, for the ill-judged or unlawful payment. Therefore this action against the town itself, by an averment in the complaint that the money was paid to the public authorities thereof, might appear to be without cause. So we held in *City of Rochester v. Town of Rush*, 80 N. Y. 302. There the statement of facts was that the money was paid to the authorities of the town in payment of the expenses of the town. It is not stated that it ever went from the hands of the officers to the use of the town. The averment of facts now before us is that the town had and received the money, and applied it to its own use; and that averment is aided by the other, that the money was applied in payment of those bonds of the town. Taken together, the allegation is that the town received the money, and with it made payment of its bonds, or some of them. The bonds, as we have seen (64 N. Y., *supra*), were town charges, for which

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the town was liable. By their payment, a town charge and liability was discharged. We have before this affirmed judgments recovered against a town for money of another had and received by the town, and applied to its use. *Hathaway v. Cincinnatus*, 62 N. Y. 434-447, cited and approved of in 64 id., *supra*; *Gould v. Oneonta*, 71 id. 298; *Supervisors of Dutchess v. Sisson*, 24 Wend. 387; *People ex rel. v. Hawkins*, 46 N. Y. 9.

It is not to be denied that the legislation of the last two decades of years, wise or otherwise, has affected, I may say has changed, the character and capacity of the simple township of former days. The legislature has imposed liabilities and obligations and corresponding duties upon it, that have made it something different from a mere political division of the State, and brought it in character and capacity nearer to a municipal corporation. The legislature has commanded a town in the State to issue bonds. They are to be the bonds of the town; when issued they are the bonds of the town; not of any officer of the town, not of the persons dwelling at the time in the town, not of the property situated there. So far then the township has been, by legislative power, made an entity, with capacity as a town to incur a debt and make an obligation, and become liable to pay. With this capacity must of need go the power to pay, the power to get money to pay, the power and capacity to receive money for its use in making payment. And therewith must go all incidents that follow that power and capacity. If by chance it gets the money of any one without the right to it, for the purpose of meeting its obligations, and applies that money to its own use in meeting them, it follows that it incurs a liability to that person therefor, as well as would a natural person, or any municipal corporation, doing the same thing. To this end are the cases just above cited.

The judgments sustaining the demurrer should be reversed, the demurred overruled, with leave to the defendant to answer over on payment of costs.

Judgment accordingly.

All concur, except EARL, J., not voting.

CHENANGO BRIDGE COMPANY V. PAIGE.

(88 N. Y. 178)

Constitutional law — rival toll bridges across river.

The plaintiff was incorporated to erect a toll bridge across a certain fresh water river, and while it should keep the same passable the erection of any bridge by others within two miles of it was forbidden. It built and maintained the bridge. Subsequently the B. Bridge Company was incorporated and authorized to build another public toll bridge some eighty rods above the former, and did so build and maintain it. Afterward the latter bridge was swept away by an extraordinary flood and carried away the former bridge by striking it. In an action against the estate of a promoter, stockholder and builder of the latter bridge, for the destruction of the former bridge and the loss of tolls, *held*, that it would not lie for the destruction of the bridge, because the latter company had a right to maintain their bridge for public travel at times when the former bridge was impassable; but that the action would lie for the loss of tolls.

ACTION of damages. The opinion states the case. The plaintiff had judgment below.

E. Countryman and Stephen C. Millard, for appellants.

O. W. Chapman, for respondent.

EARL, J. The plaintiff was incorporated by the act chapter 119 of the Laws of 1808, to build and maintain a bridge over the Chenango river, and by its charter it was provided that it should not be lawful for any person or persons to erect any other bridge over the same river within two miles either above or below the bridge to be erected by the plaintiff. Soon after its incorporation the plaintiff erected a bridge over the river at Binghamton and maintained it until it was swept away, as hereinafter mentioned.

In 1855, by the act chapter 164 of that year, the Binghamton Bridge Company was incorporated to build a bridge over the same river. It was authorized to build its bridge within two miles of plaintiff's bridge, at a point not less than eighty rods above it, and to take tolls for the use of the same, and it was empowered to purchase, take and hold real estate for the purpose of its bridge. In 1855 and 1856, it built its bridge less than one hundred rods above

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plaintiff's bridge and maintained it as a toll bridge for public travel until it was swept away, as hereinafter mentioned.

Hazard Lewis, defendants' testator, was one of the principal promoters of the Binghamton Bridge Company, and one of its largest stockholders. He was a director of the company from its organization and its president from 1858 to the time of his death, on the 2d day of July, 1863. He built the bridge by contract with the company, and aided in maintaining it and keeping it in repair to the time of his death.

The plaintiff, claiming that its charter constituted a contract that the legislature would not license or authorize the construction of any other bridge over the river within two miles of its bridge, and that the charter of the Binghamton Bridge Company, so far as it authorized that company to maintain a bridge for public travel was a violation of that contract and therefore null and void, in 1856 commenced an action against that company, praying in its complaint for judgment that the defendant therein be perpetually enjoined from constructing, using or allowing its bridge to be used for public travel, and from receiving any tolls or compensation for crossing its bridge, and that it be required to remove or shut up the same, so that it could not be used to the injury of the plaintiff, and also praying for damages. That action was brought to trial and the plaintiff was defeated. It then appealed to the General Term of the Supreme Court, and then to the Court of Appeals, and the judgment against it was affirmed, those courts holding that there was not such a contract as plaintiff claimed, and that the charter of the Binghamton Bridge Company gave it valid authority to build and maintain its bridge for public travel. 27 N. Y. 87. The plaintiff then appealed to the Supreme Court of the United States, where the judgment of the State courts was, in December, 1865, reversed. 3 Wall. 51. That court held that plaintiff's charter constituted an inviolable contract that the legislature would not authorize or license the erection of another bridge within the limited distance, and that so far as the charter of the Binghamton Bridge Company authorized it to maintain its bridge for public travel, it was null and void.

In March, 1865, nearly two years after the death of Lewis, there was an unprecedented flood in the Chenango river, and it swept away the bridge of the Binghamton Bridge Company, and that was carried down the stream against plaintiff's bridge and swept that

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away. Four years afterward, in 1869, this action was commenced against the executors of Lewis to recover damages for the destruction of plaintiff's bridge and for loss of tolls. The theory upon which the plaintiff sought to maintain the action was that the upper bridge was an unlawful structure—a nuisance—and that as Lewis built it and aided during his life-time in maintaining it, his estate could be made liable for the damages caused thereby to the plaintiff. The action was brought to trial, and plaintiff recovered for the loss of the bridge and the loss of some tolls. Its judgment was, upon appeal to the General Term, reversed upon a question of evidence, 63 Barb. 111. A new trial was then had. There was no claim upon the trial that the upper bridge was carelessly or improperly built or maintained. The undisputed proof showed that that bridge was swept away by a flood in the river greater and more violent than had ever been known there before. The trial judge sustained the theory upon which the plaintiff commenced its action, and holding that there was no dispute in the evidence as to the amount of plaintiff's damages, directed a verdict in its favor for \$8,200 for damages to its bridge and \$785.94 for damages by reason of the diversion of tolls from its bridge. The defendants then appealed to the General Term of the Supreme Court, where the judgment was affirmed (8 Hun, 292) and then they brought this appeal to this court.

The main question to be determined by us is whether the plaintiff was entitled to recover the large sum awarded to it for the destruction of its bridge. We are of the opinion that it was not.

The Chenango river is a fresh water stream. It is the private property of the riparian owners. The public, in such streams, have an easement only for navigation and for floating logs and timber. As well said in *Ex parte Jennings*, 6 Cow. 518: "The public right is one of passage, and nothing more, as in a common highway. It is called by the cases an easement; and the proprietor has a right to use the land and water of the river in any way not inconsistent with this easement. If he make any erection rendering the passage of boats, etc., inconvenient or unsafe, he is guilty of a nuisance; and this is the only restriction which the law imposes upon him." And when the case between these two bridge companies was first before this court (26 How. Pr. 124), Judge SMITH, in an opinion written by him, said: "The Chenango river is a fresh water stream, in which the tide does not ebb and

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flow, and is therefore a private river. The riparian proprietors own the bed and banks. As early as 1798 it was declared a public highway, but subject to the public easement for the purpose of navigation. The riparian owners might make such use of it as they pleased ; might bridge and dam it, except as prohibited by acts of the legislature, and might cross it with ferries, except as so forbidden.

The legislature, except under the power of eminent domain, upon making compensation, can interfere with such streams only for the purpose of regulating, preserving and protecting the public easement. Further than that, it has no more power over these fresh water streams than over other private property. It may make laws for regulating booms, dams, ferries and bridges, only so far as is necessary to protect and preserve the public easement ; and when it goes further, it invades private rights protected under the Constitution. *Canal Com'rs v. People*, 5 Wend. 423, 448 ; *State v. Wheeling & Belmont Bridge Co.*, 18 How. 421, 432 ; *Morgan v. King*, 35 N. Y. 454.

Any person owning the land upon both sides of such a river can maintain a ferry or bridge or dam for his own use, provided he does it so as not to interfere with the public easement, without any authority from the legislature, and even in defiance of a legislative prohibition. In such case he would but be making a proper use of his own property. Such use must however be such as not to interfere with the rights of other riparian owners. And there is one more limitation : He cannot, without legislative authority, maintain a bridge or ferry for public and general use, because public highways and toll bridges and toll ferries are subject to legislative regulation and control. As said by Judge DAVIS, in 3 Wall.: "The legislature has the power to license ferries and bridges, and so to regulate them, that no rival ferries or bridges can be established within certain fixed distances. No individual without a license can build a bridge or establish a ferry for general travel, for ' it is a well-settled principle of common law that no man may set up a ferry for all passengers, without prescription time out of mind, or charter from the king. He may make a ferry for his own use, or the use of his family, but not for the common use of all the king's subjects passing that way, because it doth in consequence tend to a common charge, and is become a thing of public interest and use ; and every ferry ought to be under a public regulation.' "

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Now what rights did the legislature give the plaintiff by its act of incorporation? It made it a corporation, and gave it the corporate right to build its bridge. For that purpose only a corporation was not needed, nor was legislative sanction needed. But being authorized by the legislature to build the bridge, it could not be complained of for any necessary interference with the public easement which was under legislative control; for that which is authorized by law cannot be a public nuisance. *Crittenden v. Wilson*, 5 Cow. 165; *People ex rel. Murphy v. Kelly*, 76 N. Y. 475, 482. It was also authorized to maintain the bridge for public travel, and to take tolls for the use of the bridge; and these it could not do without legislative authority. The legislature did not empower it to interfere with the stream, except so far as was necessary for the building and maintenance of its bridge, and gave it no authority, and could give it no authority, except under the power of eminent domain upon compensation, to interfere in any way with riparian rights of owners above or below its bridge.

What rights were conferred upon the Binghamton Bridge Company by the act of 1855, incorporating it? The act unquestionably made it a corporation, and it had all the rights and powers conferred upon it by the act against the whole world except the plaintiff. No one but the plaintiff could assail any of its corporate rights, so long as its bridge was properly and safely maintained, so as not unnecessarily to interfere with the public easement. The plaintiff's bridge might have been swept away, or might have been abandoned by it, or it could, for a consideration, have surrendered its exclusive right to the Binghamton Bridge Company; and in such case that company could have exercised all its corporate franchises in a proper manner, without question from any source. The plaintiff's charter gave it the exclusive right between the limits specified, only while its bridge was passable. The Binghamton Bridge Company could therefore under its charter maintain its bridge for public travel, without violating plaintiff's rights, while its bridge was not in condition to be used for public travel. How far then did the act of 1855 violate the contract made with the plaintiff in its act of incorporation? Not by authorizing the construction of the bridge. That, as a structure, did no harm to the plaintiff. As a bridge it invaded none of its rights. As to it the bridge was neither unlawful nor a nuisance; and the plaintiff could not complain of its existence so long as it was maintained with proper care and

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skill. There was a lawful purpose for which the legislature as against the plaintiff could have authorized its construction, to wit: to be used for public travel while its bridge was not passable.

But suppose we are wrong in holding that the charter of the Binghamton Bridge Company was not wholly null and void; and suppose that it was wholly invalid, so that those who built the bridge had no corporate protection whatever; what then follows? Then the corporation must be regarded as non-existent, and the bridge was built by those concerned in the supposed corporation as individuals having the rights of riparian owners. They could build the bridge for their private use as riparian owners, or they could build it for no use and permit it to stand as a monument of their folly; and so long as it did not interfere with the public easement or with riparian rights, it would neither be a nuisance nor unlawful.

It is said however that there was no proof that the Binghamton Bridge Company owned the lands on both sides of the river where it built its bridge. There was proof that it owned the land upon one side, and as its bridge had been maintained for ten years, it must be presumed that it owned the land upon the other side or occupied it by the license of the owner. But even if it did not own the land upon either side, and hence had trespassed upon the lands of others, the plaintiff cannot complain of, and has no concern with, such trespasses.

But it is strenuously contended by the learned counsel for the plaintiff that as the upper bridge was built designedly as a toll bridge for public travel, it thereby became unlawful and a nuisance. His argument on this branch of his case was quite ingenious, but we cannot doubt was unsound. His contention is, that the unlawful use cannot be separated from the structure, and that the structure was a nuisance and could have been abated as such, because it was built and used for an unlawful purpose. This contention finds no warrant in the decision of the Federal court, reported in 3 Wallace. It was not there decided that the bridge itself was a nuisance or unlawful, and no such question was before the court. The improper use of the bridge, which was claimed to be justified under the charter of the Binghamton Bridge Company, was the matter there in controversy. A wrong or unlawful motive in erecting a building otherwise lawful does not make the building itself unlawful or a nuisance. In such a case the unlawful use may be

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complained of, restrained or abated, but the building cannot be destroyed. Take two cases somewhat analogous to this : Suppose one erects upon his own land a house intended to be used as a bawdy house, and while it is being so used it is blown down without any fault of the owner, and injures the adjoining property of another who had the right to complain of the use of the house as a nuisance; could the party thus injured sue the owner of the house for the injury to his property ? Or suppose one erects upon his own land a steam boiler manufactory, and carries on therein the business of manufacturing boilers in such a way as by the noise to make his business an actionable nuisance to one living upon the adjoining lot; and suppose the building is blown down without his fault, and injures the neighboring property; can the owner thereof recover for the injury thus done him ? It is plain that these questions must be answered in the negative. In both of the cases supposed, the buildings are lawful structures, and it is the use only which could be complained of, and the use has nothing whatever to do with the injury. So here the bridge was a lawful structure, and it was its use only which was unlawful, and such use had nothing whatever to do with the destruction of plaintiff's bridge. To further illustrate these views a few cases may be referred to. In *Barclay v. Commonwealth*, 25 Penn. St. 503, WOODWARD, J., said : " Where an erection or structure itself constitutes the nuisance, as where it is put up in a public street; its demolition or removal is necessary to the abatement of the nuisance ; but where the offense consists in a wrongful use of a building, harmless in itself, the remedy is to stop such use, not to tear down or remove the building itself." In *Moody v. Supervisors of Niagara Co.*, 46 Barb. 659, it was held, that the fact that a house is kept as a place of prostitution is sufficient to render it a public and common nuisance ; that a house cannot be lawfully destroyed by a riot or mob, merely because for the time being it is devoted to a purpose which the law characterizes as a common nuisance, and that for the purpose of abating a nuisance, so much only of the thing as causes the nuisance should be removed ; and that where it is the wrongful use of the building that constitutes a nuisance, the remedy is to stop such use, not to tear down or demolish the building itself. To the same effect are *Ely v. Supervisors of Niagara Co.*, 36 N. Y. 297, and *Rabcock v. City of Buffalo*, 1 Sheld. 317, affirmed in 56 N. Y. 268. In *Phelps v. Nowlen*, 72 id. 39; s. c., 28 Am. Rep. 93, it was held, that a party

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is not liable for the consequences of an act done upon his own land, lawful in itself, and which does not infringe upon any lawful rights of another, simply because he was influenced in the doing of it by wrong and even malicious motives.

We conclude therefore that there was error in awarding to the plaintiff damages for the destruction of its bridge.

But the damages for the wrongful diversion of tolls from plaintiff's bridge stand upon a different footing. It was wrongful to maintain and use the upper bridge for public travel as a toll bridge. In using or allowing the bridge to be used for that purpose, the owner thereof infringed upon the rights of the plaintiff secured to it under its charter, and did it an actionable injury, and the damages for such injury must be measured by the amount of tolls diverted. As a wrong was thus done to the plaintiff, we can see no reason for not applying the general rule, that all persons who are engaged in a wrongful or unlawful act are liable for the consequences thereof, whether they act as principals or as agents. The testator, Lewis, was active in building and maintaining the bridge for the purpose of the use to which it was subjected. He was a director from the organization of the Binghamton Bridge Company, and its president at the time the tolls were taken for which he has been held, and he was a large stockholder in that company. He was actively engaged in resisting the suit brought by this plaintiff against that company, and was fully notified of plaintiff's claim that that company had no right to allow public travel or take toll upon that bridge. In these acts there was enough, *prima facie* at least, to make him liable as a wrong-doer within the rule above stated, unless he was shielded by considerations now to be noticed. It is claimed that he could not be a wrong-doer for acting under an act of the legislature. But that act was unconstitutional, so far as it authorized the maintenance of that bridge for public travel. An unconstitutional act is as if it had never been passed by the legislature. It can confer no rights and afford no protection. As said by Judge COOLEY, in his work on Constitutional Limitations, at page 188: "When a statute is judged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void *in toto* is true also as to

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any part of an act which is found to be unconstitutional, and which, consequently, is to be regarded as having never, at any time, been possessed of any legal force." Therefore whether Lewis must be considered to have acted for himself as a stockholder, or as an agent of the stockholders or of the corporation, the statute furnished him no protection.

[Omitting minor questions.]

It follows from these views, that plaintiff's judgment should be reversed and a new trial granted, costs to abide event; unless it will stipulate to reduce its judgment by striking therefrom the \$8,200 and the interest thereon; and in case of such stipulation, the judgment for the balance should be affirmed, without costs to either party in this court.

Judgment accordingly.

All concur except MILLER, J., who did not sit.

SCHWINGER V. RAYMOND.

(88 N. Y. 192.)

Action — for freight — offset for damage to goods carried.

In an action by a common carrier for freight of goods transported and delivered, the defendant may recover, over and above the freight so earned, a balance for damage to goods carried, occasioned by the carrier's negligence.*

ACTION for freight. The opinion states the case. The plaintiff had judgment below.

E. Darwin Smith and D. C. Hyde, for appellants.

G. W. Cothran, for respondent.

DANFORTH, J. The action was brought to recover freight agreed to be paid by defendants to plaintiff for transporting on the deck of his canal boat 200 barrels of beans, from Albion and Brockport to the city of New York. The complaint alleges that the beans were transported under this agreement, and delivered to

* See *Rescque v. Byers*, post.

the defendants, who accepted them. That the freight has not been paid, "wherefore the plaintiff demands judgment against the defendants for \$110 with interest." The defendants admit an agreement to pay freight, but allege that the plaintiff's undertaking was to "carry and deliver the beans in such a manner that they would be entirely protected from moisture;" that he did carry them to the place agreed upon, but in such a careless and negligent manner they were wet, sprouted, greatly damaged, and a loss was by reason thereof sustained by them (respondents), to the amount of \$1,008.94, "no part of which has been paid by the plaintiff, nor have the defendants paid the freight aforesaid, amounting to \$110, and the defendants demand judgment for this sum of \$1,008.94, and interest, less \$110, and interest.

To this new matter the plaintiff interposed a reply, and thereby controverted and denied "all the allegations thereof." There was then, at the outset of this litigation, an understanding on both sides of the matters really in controversy, and the issues made by these pleadings were fully litigated. It was the theory of the defendants, as indicated by the answer above set out, and especially by their prayer for judgment, that the plaintiff was entitled to have allowed to him the freight agreed upon, and they should have allowed their damages; but judgment be given only for so much thereof as should remain after cancelling the freight agreed upon. It was in pursuance of the same theory that the legal adviser of the defendants, at the close of the trial, submitted to the referee in writing a series of propositions of fact which he deemed established, and conclusions of law which he supposed would follow, with the request to find the facts and law as they were stated, "and each and every of the same, and each and every part thereof." The proposed conclusions of law were stated in these words: "*First.* That the plaintiff is entitled to recover of the defendants, \$159.77. *Second.* The defendants are entitled to recover damages of the plaintiff in the sum of \$1,452.10. *Third.* The defendants are entitled to judgment against the plaintiff in a balance of \$992.33 and costs." Thus reproducing in separate clauses the idea already embodied in a single sentence of the answer, for the sums named are the items there referred to with the interest added. The referee seems to have had the same understanding of the case, for by his report he finds: "*First.* That the plaintiff is entitled to recover the amount agreed to be paid as freight on the beans, and

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stating the amount directs judgment to be entered therefor, in favor of the plaintiff. *Second.* That the defendants are not entitled to recover, or to be allowed in this action as against the plaintiff, for the damage and injury to their property before mentioned. And answering the requests of the defendants before stated, found the first, but refused to find the second and third. The defendants excepted to the conclusions of law contained in the report, and to the referee's refusal to find the second and third requests. Upon appeal the General Term held that finding of the referee, upon the first clause in accordance with the request of the defendants, and the omission of the latter to except thereto, entitled the plaintiff to maintain the judgment, and to that effect is the respondent's argument before us. We think it is unsound. The three propositions submitted to the referee should be taken together, and construed as one sentence, with several members.

Omitting this discussion.]

But in view of the case undue effect was given by the learned judges of the Supreme Court to the admission implied in the request to find that the plaintiff was entitled to his freight. There are cases in which two claims could not co-exist; where, if the plaintiff was entitled to have his claim allowed, the defendants would be precluded from recovering, and among them are *Davis v. Talcolt*, 2 Kern. 184; *Bellinger v. Craigie*, 31 Barb. 534; *Gates v. Preston*, 41 N. Y. 113; *Blair v. Bartlett*, 75 id. 150; s. c., 31 Am. Rep. 455, cited by the learned court. They went upon the ground that the plaintiff's cause of action could be made out by overcoming the defendants' claim, that if the latter was well founded it would defeat the former, and a recovery by either would be a conclusive answer to any demand made by the other, because the litigation provoked by either would necessarily involve the matter upon which both must rely, and it could not be again litigated. Thus a recovery by a physician or surgeon of his fees for services rendered (*Bellinger v. Graigue*, *Gates v. Preston*, *Blair v. Bartlett*), or by a manufacturer for the price of the machine (*Davis v. Talcolt*), would bar an action by the patient in the first case, or the purchaser in the second, for damages by reason of non-performance of the contract upon which the fee or price depended, because, except upon proof, or admission of performance, the plaintiff could not have recovered. And if in the case before us the defendants had set up a

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claim for non-delivery or transportation of the goods, a recovery, or an admission of the plaintiff's right to recover for freight earned under the contract, would have justified the same conclusion. But that is not the case. The plaintiff did perform the contract to carry, and the goods reached their destination. He had thus performed the condition on which his right to freight depended, and he might have retained the property until payment was made, or waiving that right, deliver it, and look to the consignee or to the shipper for its payment. To the owner of the injured goods, several ways were open. He might pay the freight and sue for damages, or refusing to pay, submit to suit, set up his damages by way of counter-claim, or bring a cross-action. *Gillespie v. Torrance*, 25 N. Y. 309; *Spalding v. Vandercook*, 2 Wend. 432; *Batterman v. Pierce*, 3 Hill, 171; *Dunham v. Bower*, 77 N. Y. 80; s. c., 33 Am. Rep. 570. And a payment of freight, or a submission to judgment therefor, would afford the carrier no answer to the counter-claim or to the action. 1 Pars. Mar. Law, 215; 3 Kent Com. 225; *Griswold v. New York Ins. Co.*, 3 Johns. 321; 3 Am. Dec. 490. The distinction between the facts of this case and the cases first referred to is in like manner indicated in *Dunham v. Bower*, *supra*. Since the Code, the defendants may have affirmative and complete relief by first extinguishing the plaintiff's cause of action, and judgment for the excess. It was to that end that the answer of the defendants was framed, and to complete their purpose the requests referred to made. We think the exceptions were sufficient to entitle them to review the decision of the referee.

[Omitting minor questions.]

The judgment of the General Term and that entered on the report of the referee should be reversed and a new trial granted, with costs to abide the event.

Judgment reversed.

All concur.

DAVID V. WILLIAMSBURGH CITY FIRE INSURANCE COMPANY.

(83 N. Y. 265.)

Deed — execution under fictitious name — effect of.

The owner of real estate executed a deed thereof to a fictitious grantee, and then under the name of such grantee executed another deed thereof to another person. *Held*, that the latter got good title.

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ACTION on a policy of fire insurance. The opinion states the case. The defendant had judgment below.

Walter S. Logan, for appellant.

Osborn E. Bright, for respondents.

EARL, J. This is an action to recover upon a fire policy issued by defendant to the plaintiff, insuring certain real and personal property claimed to belong to her. A portion of the property insured was destroyed by fire, and the defendant resists payment of the loss upon the ground that the plaintiff did not, at the time of the insurance and at the time of the fire, have any interest in the property as owner thereof.

At the trial the defendant gave evidence tending to prove that the real and personal property was conveyed by Henry J. David, who then owned the same, in form to Marx David, who was a fictitious person, and then that in the name of Marx David he conveyed the same property to the plaintiff. This evidence was, as to the mythical character of Marx David, disputed on the part of the plaintiff. The court charged the jury "that if they believed that Marx David was a myth or that there was no such real person or that he never executed the deed or bill of sale, it was an end of plaintiff's case and they must find for the defendant." To this the plaintiff's counsel excepted, and this exception presents the sole question for our consideration. In considering this question it must be assumed that the bills of sale of the personal property and the deed of the real estate were delivered to the plaintiff, and that she took and had possession of the property, claiming to be the owner thereof, as there was proof tending to show these facts. It must also be assumed—as nothing to the contrary appears—that Henry J. David executed the conveyances with the intention to vest the title of the property in the plaintiff. The holding of the trial judge was that the mere fact that Marx David was not a real person defeated the passage of any title to the property to the plaintiff. In this I cannot doubt there was error.

The conveyances to Marx David were undoubtedly wholly invalid and inoperative, as there was no such person to take title; and if nothing more had been done, the title to the property would have remained in Henry J. David. But the title still remaining

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in him, he executed the bills of sale and the deed to the plaintiff, using or adopting, for that purpose, the name of Marx David. The papers thus executed were undoubtedly valid against him. In executing any instruments, I can find no authorities which hold that one is not bound by the name he adopts or uses. *Pro hac vice* it is his name. In Com. Dig. Fait E. 3 it is said: "If a man be baptized by one name and known by another, a grant by the name by which he is known shall be good;" and "if Jane B. makes a lease by the name of Joan, it shall be good." In *George v. Surrey*, 1 M. & M. 516, it was held that an indorsement of a bill could be made by a simple mark. *Baker v. Dening*, 8 Ad. & El. 94, it was held that a will which was required by law to be signed by the testator could be signed by his mark simply. In *Brown v. Butchers & Drovers' Bank*, 6 Hill, 443, it was held that where a party placed the figures "1, 2, 8," upon the back of a bill of exchange by way of substitute for his name, intending thus to bind himself as indorser, the indorsement was valid, although it appeared that the indorser could write. In *Grafton Bank v. Flanders*, 4 N. H. 239, it was said by RICHARDSON, C. J., that "if an individual assume a name for the purpose of making a written contract, and put that name to the contract with a view to bind himself, there seems to be no reason why courts should not consider the name thus assumed as his name *pro hac vice*, and hold him to fulfill the contract. And it must now be considered as settled, that he is bound by such a contract." In *Palmer v. Stephens*, 1 Den. 471, BEARDSLEY, J., said: "A person may execute an instrument and bind himself as effectually by his initials as by writing his name in full. Figures or a mark may be used in lieu of the proper name; and where either is substituted by a party, intending thereby to bind himself, the signature is effective to all intents and purposes," and DALY, C. J., in *Petition of John Snook*, 2 Hilt. 566, after a learned and exhaustive examination of the whole subject of names, said: "There are numerous cases, both in this country and in England, holding that where a man enters into a contract or does any act in a particular name, he may be sued by the name that he used, whatever his true name may be, and generally that wherever a man has done an act in a particular name, or where he makes a grant, it may always be shown in support of the validity of the act, that he was known by that name at or about the time when the act was done, though he may have been baptized or previously known by a

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different name. All that the law looks to is the identity of the individual, and when that is clearly established the act will be binding upon him and upon others." Surely if a mere mark or figures or initials will bind one who uses them in the execution of a contract or conveyance with intent to be bound, he will for the same reasons be bound if he uses certain letters of a fictitious name with the same intent. Henry J. David assumed the name of Marx David, and executed the papers in that name, intending that they should be effectual to vest title in the plaintiff, and I know of no rule of law which requires that intent to fail.

Nearly all the property destroyed by the fire was personal; and as to that, no matter how Henry J. David executed the transfer, if he intended the title to pass, it could pass by mere delivery.

There was no proof that the name of Marx David was used for any fraudulent purpose; and if it was so used, the defendant would be concerned only with a purpose to defraud it.

The plaintiff therefore having shown title to the property good as against Henry J. David, and no other claimant to the property appearing, she showed title sufficient to sustain her action against the defendant.

For the error in the charge above specified the judgment should be reversed and a new trial granted, costs to abide event.

Judgment reversed.

All concur.

RISLEY V. PHOENIX BANK OF CITY OF NEW YORK.

(83 N. Y. 318.)

Check — assignment — evidence — confiscation act.

One for a valuable consideration orally agreed with another to assign to him a portion of a deposit in a bank, and at the same time drew and delivered to him his check therefor. This was before the passage of the Federal confiscation act. The payee duly presented the check and demanded payment, at the same time informing the bank of the assignment. The bank promised to pay the check on its identification of the payee. The check being presented the next day, payment was refused on the ground that the entire deposit had meantime been seized by the United States government under the confiscation act. In an action against the bank on the check,

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held, (1) that the assignment could be proved by parol ; (2) that the seizure was invalid as to the plaintiff ; (3) that the confiscation act does not authorize the seizure of corporate property ; (4) that an adjudication of forfeiture by the District Court was without jurisdiction and invalid. (*See note, p. 433.*)

ACTION on a check. The opinion states the facts. The plaintiff had judgment below.

Samuel Hand, for appellant.

James E. Risley, for respondent.

ANDREWS, J. The check drawn by the bank of Georgetown on the defendant, having been drawn on the general deposit of the drawer in the hands of the drawee, in the ordinary form of a bank check, did not, of itself, operate as an equitable assignment to the payee of the fund, to the amount of the check. The check was a bill of exchange, within the statute that no person shall be charged as an acceptor of a bill of exchange, unless his acceptance shall be in writing ; and the defendant not having made a written acceptance of the check, no right of action thereon accrued to the plaintiff by reason of the verbal promise to pay the check made by the defendant on its presentation. 1 R. S. 768, § 6 ; *Harker v. Anderson*, 21 Wend. 372 ; *Luff v. Pope*, 5 Hill, 413 ; *Chapman v. White*, 6 N. Y. 412 ; *Duncan v. Berlin*, 60 id. 153 ; *Atty.-Gen. v. Continental Life Ins. Co.*, 71 id. 333 ; s. c., 27 Am. Rep. 53.

The court, on the trial, ruled in accordance with the settled doctrine upon this subject, that the plaintiff was not entitled to recovery upon the cause of action founded upon the check and the verbal promise of payment. But the court further ruled, that he was entitled to recover upon the third cause of action, which alleged an assignment of \$10,000 of the debt owing by the defendant to the Bank of Georgetown, made on the 20th day of May, 1861, the day upon which the check was dated and delivered to the plaintiff, if the jury should find that concurrently with the giving of the check there was an oral agreement, for a valuable consideration made between the Bank of Georgetown and the plaintiff, to assign to the latter \$10,000 of its debt against the Phoenix Bank. The court stated to the jury, that if the transaction between the plaintiff and the Bank of Georgetown was simply a purchase of the check or draft, the plaintiff could not maintain the action, and

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that the question for the jury to determine was, "whether there was, independent of the check, an agreement of assignment and purchase and sale of \$10,000 of the debt from the Phoenix Bank to the Bank of Georgetown;" and that if there was such an agreement, the plaintiff was entitled to recover.

The Phoenix Bank, prior to May 20, 1861, was the correspondent in the city of New York of the Bank of Georgetown, a banking corporation located at Georgetown, South Carolina; and on that date there was on its books a credit to the Bank of Georgetown to the amount of about \$18,000, derived from deposits and collections, which sum was then owing by the Phoenix Bank to the Bank of Georgetown. The plaintiff was a resident of Georgetown, and had dealings with the Bank of Georgetown. He was examined on the trial, as a witness in his own behalf, and testified in substance that on the day when the check was dated the president of the bank stated to him that the bank had a claim of \$17,000 or \$18,000 against the Phoenix Bank, and offered to sell it to the plaintiff, stating as a reason, that he was afraid it might be lost during the war, and that he was unwilling to carry the risk; that the plaintiff offered to purchase the claim at fifty cents on the dollar, which offer was declined, and the president then offered to sell it for southern bank bills at par; that the plaintiff then offered, if the bank would divide the claim, to purchase \$10,000 of it, upon the terms proposed, which offer was accepted, and the plaintiff thereupon paid the \$10,000; that a question arose as to what kind of a transfer should be given, and the president of the bank said he would give the plaintiff an order on the Phoenix Bank for the amount, and thereupon gave the plaintiff the check before referred to, and this completed the transaction between the plaintiff and the Bank of Georgetown.

The check was not presented to the Phoenix Bank for payment until January 4, 1865. The plaintiff testifies that on that day he presented the check at the bank to the president, and told him he had called to collect it; that the president, after looking at the check, said it was good, and that it would be paid on presentation by some person known to the bank; that he thereupon stated to the defendant's president that the Bank of Georgetown had transferred to him so much of its claim against the defendant as was represented by the check. The next day the check was again presented by a person known to the defendant, and the bank then

refused payment, on the ground that the debt had, on the morning of that day, been seized by the United States, as forfeited under the confiscation acts of Congress. The amount standing to the credit of the Bank of Georgetown, on the books of the Phoenix Bank January 4, 1865, was \$12,117.38. The credit existing May 20, 1861, had been reduced by checks charged against the account, drawn by the Bank of Georgetown, after that date, and paid by the Phoenix Bank ; but no new deposit had been made, and the Phoenix Bank had no lien upon or relation to the fund remaining in its hands January 4, 1865, except as simple depositary of the Bank of Georgetown. The defendant denied in its answer the assignment alleged in the complaint, and sought to discredit the plaintiff's testimony in respect to the purchase from the Bank of Georgetown, by introducing his testimony on a former trial, in which he made no allusion to the negotiation for the purchase of the claim, to which he testified on this trial. The defendant also controverted the plaintiff's evidence upon the point of notice to the officers of the defendant, of the transfer to him by the Bank of Georgetown, of \$10,000 of its claim. But the jury found for the plaintiff upon these controverted questions and their finding is conclusive upon this appeal.

It is claimed however that admitting the truth of the plaintiff's narration of the transaction with the Bank of Georgetown, it did not in law constitute an assignment by the bank to the plaintiff of \$10,000 of the debt against the defendant, for the reasons, *first*, that the contract actually made was reduced to writing, and is represented by the check, and that oral evidence was inadmissible to show that any thing else was contemplated by the parties, except the sale and purchase of a bill of exchange, with the ordinary incidents flowing from that transaction ; *second*, that there was no delivery of any account, document or writing showing the existence or character of the debt undertaken to be assigned ; and *third*, that the alleged assignment only included a part of the general fund on deposit with the defendant to the credit of the Bank of Georgetown.

We are of opinion that neither of these objections is tenable. The relation between the Phoenix Bank and the Bank of Georgetown was that of debtor and creditor. The order drawn by the Bank of Georgetown upon the Phoenix Bank was not a contract between the parties to this action ; and as between the plaintiff and the Bank of Georgetown, the giving of the order was equally con-

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sistent with the ordinary transaction of the purchase of a draft, or the assignment of the debt against the Phoenix Bank, to the amount of the order, and the taking of the order as a convenient method of enabling the plaintiff to collect and receive the portion of the debt assigned. The fact that the plaintiff became the owner of the debt, by agreement between him and the Bank of Georgetown, made contemporaneously with the delivery of the check, imposed no new obligation upon the defendant. The Phoenix Bank was not bound to give a written acceptance of the order. Nor could it be made liable upon the check without a written acceptance. It was bound, as it had always been, to account for the fund in its possession to the Bank of Georgetown or to its assignee, and pay it over on demand of the legal owner.

In respect to the claim that there was no delivery to the plaintiff, at the time of the alleged transfer, of any account or document showing the claim intended to be assigned, it is to be observed that the claim of the Bank of Georgetown against the Phoenix Bank rested in open account on the books of the respective banks. The chose in action assigned was not a note or bond or other written obligation, the retention of which by the alleged assignor would, in most cases, be strong if not conclusive evidence that the assignment had not been completed. But an assignment of an account may be made without writing or delivery of any written statement of the claim assigned, so as to vest in the assignee a right to proceed in his own name for the recovery of the debt, provided only that the assignment is founded on a valid consideration between the parties. In *Heath v. Hall*, 4 Taunt. 327, Lord MANSFIELD said: "If two men agree for the sale of a debt, and one of them gives the other credit in his books for the price, that may be a very good assignment in equity; its resting in parol is no objection." In *Tibbits v. George*, 5 Ad. & El. 107, a verbal assignment of a portion of a debt was held to be good. Lord DENMAN said: "None of the authorities which have been cited show that it is necessary that the assignment should be in writing in order to pass an equitable interest, although in very many cases there was a writing." In *Crocker v. Whitney*, 10 Mass. 316, JACKSON, J., speaking of an assignment to the plaintiff of money of the assignor in the hands of the defendant, said: "But there appears to be no reason why it may not be as well affected by a verbal request or assignment." And in *Dunn v. Snell*, 15 Mass. 481, it was held, that the delivery

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of an execution was a good equitable assignment of a judgment; and PARKER, C. J., said: "It is not doubted that this debt, upon which this judgment was rendered, might have been assigned in writing without seal, or even, according to the decisions, without writing."

The claim that there can be no valid assignment of a part of an entire debt or obligation is opposed to the well-settled rule in this State. *Taylor v. Bates*, 5 Cow. 376; *Wheeler v. Wheeler*, 9 id. 34; *Pattison v. Hull*, id. 747; *Field v. Mayor*, 6 N. Y. 179. The point was ruled in the same way by the court of King's Bench in *Tibbitts v. George*, *supra*. The tendency of modern decisions is in the direction of more fully protecting the equitable rights of assignees of choses in action, and the objection, that to allow an assignment of part of an entire claim might subject the creditor to several actions to enforce a single obligation, has much less force under a system which requires all parties in interest to be joined as parties to the action. See note to *Morton v. Naylor*, 1 Hill, 585.

We come then to the principal remaining question in the case, arising upon the exception of the defendant to the exclusion on the trial of the record of the District Court of the United States for the southern district of New York, offered to sustain the defense alleged in the answer that the deposit in the Phoenix Bank to the credit of the Bank of Georgetown was on the 5th day of January, 1865, duly seized and attached in pursuance of proceedings instituted on that day by the United States, under the act of Congress approved August 6, 1861, entitled "An act to confiscate property used for insurrectionary purposes," and the subsequent act approved July 17, 1862, entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes;" and that subsequently, on or about the 24th day of January, 1865, in pursuance of the decree of the court duly made, the defendant paid over to the marshal the sum of \$12,117.38, the whole amount of the credit of the Bank of Georgetown with the Phoenix Bank.

It appears by the record of the proceeding in the District Court, that on the 5th day of January, 1865, a *libel* of information was filed, by the attorney of the United States for the district in which the proceedings were instituted, "Against the estate, property, money, stocks, credits and effects, to wit: Against \$15,000 (fifteen thousand dollars), more or less, belonging to the Bank of Georgetown,

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a corporation doing business in the State of South Carolina, which said \$15,000 is now in cash, and is now on deposit in the Phoenix Bank, a corporation doing business in the city of New York." The information — or libel of information, as it is called — alleges a seizure by the marshal on that day, by and under the authority of the president of the United States, and in obedience to the instructions of the attorney-general, and in pursuance of the acts of Congress before referred to, of "the estate and property, money, stocks, credits and effects aforesaid, to the end that the same may be confiscated, forfeited and condemned," as provided in said acts. The information then proceeds to set forth various causes of forfeiture under the acts of 1860 and 1862, viz.: *First*, that the Bank of Georgetown acquired the property seized with the intent specified in the act of 1861, and used and employed it with that intent; *second*, that the corporation, since the 17th day of July, 1863, acted as the fiscal agent of the confederate government and of several of the States of the Confederacy, and accepted such agency from the several States after the date of the ordinances of secession of those States; *third*, that since the 17th of July, 1861, the Bank of Georgetown, while owning property in the State of New York, had given aid and comfort to the rebellion, in the ways and by the acts set forth in the information; *fourth*, that the corporation, after the passage of the act of July 17, 1862, being engaged in aiding and abetting the rebellion, did not, within sixty days after the proclamation of the president of July 25, 1862, cease therefrom. The information avers that by reason of the causes alleged, the "said property, estate and effects" were liable to confiscation and condemnation, under the acts of Congress, and demands judgment sentencing it to be condemned as confiscated and forfeited to the United States. On the same day on which the information was filed, viz.: January 5, 1865, a monition, so called, was issued to the marshal, reciting the filing of an information against \$15,000, more or less, belonging to the Bank of Georgetown, "which said \$15,000 is now in cash, and is now on deposit in the Phoenix Bank," and directing the marshal to attach the "said \$15,000," and to give due notice to all persons claiming the same or knowing or having any thing to say why the same should not be condemned, to appear before the court in which the proceedings were taken, on the 24th day of January, 1865, at an hour named, to interpose a claim for the same and make their allegations in

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that behalf. On the 24th of January the marshal made his return to the monition, that he had, on the 5th day of January, 1865, attached "\$13,000, more or less, deposited in the Phoenix Bank, belonging to the Bank of Georgetown," and had given due notice as required thereby. On the same day a decree was entered that "\$12,117.38, belonging to the Bank of Georgetown, in the State of South Carolina, and now on deposit in the Phoenix Bank, in the city of New York, which said \$12,117.38 has been heretofore seized by the marshal in this proceeding, be and the same is hereby condemned as forfeited to the United States," and directing a writ of *venditioni exponas* to issue, returnable February 14, 1865, and that upon the return thereof the marshal pay into the registry \$12,117.38, to abide the further order of the court. The decree recites that it was made upon default, and the record does not show that any proofs were taken of the facts alleged in the information. The *venditioni exponas* was issued on the day the decree was entered, and on the 26th of January, two days thereafter, the marshal returned that he had collected from the Phoenix Bank, \$12,117.38 and had paid it to the clerk of the court. On the 27th day of January a decree distributing the fund collected was made, awarding it in equal parts to the United States and the informer.

We are of the opinion that the record of the confiscation proceedings, if admitted in evidence, would have constituted no defense to the action. The claim of the plaintiff to the fund in question had its origin in an assignment from the Bank of Georgetown, made May 20, 1861, prior to the passage of either of the confiscation acts, under which the proceedings for forfeiture were taken; and if notice to the Phoenix Bank was necessary to complete the title of the assignee, such notice, as the jury have found, was given to the bank January 4, 1865, the day prior to the seizure by the marshal. The decree of the District Court adjudges that the property seized was the property of the Bank of Georgetown, contrary to the fact as found by the verdict in this case. The question arises, whether the adjudication of the District Court concludes the plaintiff from contesting the fact that the property condemned was, at the time of the seizure and decree, the property of that corporation. If proceedings and judgment under the confiscation acts are strictly *in rem*, it would be difficult to deny the conclusiveness of the judgment in respect to every material fact adjudicated thereby. To such proceedings all persons are deemed to be parties, and persons

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claiming any right or interest hostile to the proceedings are bound to come in and assert such right or interest; and failing to do so, they are conclusively bound by the judgment. A judgment *in rem* operates upon the *status* of the subject-matter involved, and renders it what it declares it to be. Thus, the sentence of a court of admiralty, having jurisdiction, decreeing a ship to be a loyal prize, is conclusive as to every ground of fact upon which it proceeds, and until reversed on appeal, the facts adjudged are conclusively established thereby as against the whole world. *Bernardi v. Motteux*, Doug. 581; *Rose v. Himely*, 4 Cr. 241; *Broom's Leg. Max.* 920; 2 *Smith's Lead. Cas.* 808, and cases cited.

But as we understand the decisions of the Supreme Court of the United States in *Day v. Micou*, 18 Wall. 156, and *Conrad v. Waples*, 96 U. S. 279, confiscation proceedings under the acts of Congress referred to, while in the nature of proceedings *in rem*, operate only to divest the title and interest of the party alleged to be the owner of the property seized, and as against whom the seizure is made, and that judgment of confiscation and forfeiture does not divest the title of third persons originating prior to the seizure, or of the real owner not proceeded against.

In *Day v. Micou* it was held that the interest of a mortgagee under a mortgage executed in 1858 was not divested by proceedings under the confiscation act of July 17, 1862, against the owner of the land mortgaged and a sale pursuant to the judgment thereon. STRONG, J., in speaking for the majority of the court, after referring to the seventh section of the act, said: "What property is this thus brought within the jurisdiction of the District Court? Beyond doubt the property which had been seized, that is, the estate and property of the offending person, and no other.

* * * It is true proceedings *in rem* were ordered to be instituted in the District Court, but the question remains, what was the *res* against which the proceedings were directed? The answer must be, that which was seized and brought within the jurisdiction of the court. A condemnation in a proceeding *in rem* does not necessarily exclude all claim to other interests than those which were seized. In admiralty cases and in revenue cases a condemnation and sale generally pass the entire title to the property condemned and sold. This is because the thing condemned is considered as the offender or the debtor, and is seized in entirety. But such is not the case in many proceedings which are *in rem*. Decrees of

courts of probate or orphan courts, directing sales for the payment of a decedent's debts or for distribution, are proceedings *in rem*. So are sales under attachments or proceedings to foreclose a mortgage, *quasi* proceedings *in rem*, at least. But in none of these cases is any thing more sold than the estate of the decedent, or of the debtor or the mortgagor in the thing sold. The interests of others are not cut off or affected." The learned justice concludes as follows: "If then, as we hold, the property and estate of J. P. Benjamin was all that was seized, or all that could be seized and condemned in these confiscation proceedings, those who held other interests in the land were not bound to come in and assert their claims. Their interests did not pass to the purchaser at the sale, and they remain unaffected by the decree of condemnation and the sale thereunder."

Conrad v. Waples was ejectment—the plaintiff claiming title under a deed executed by his father, Charles M. Conrad, May 6, 1862, of lands in the city of New Orleans. The defendant claimed title under a deed from the marshal of the United States, executed in March, 1865, upon a sale under a decree of the District Court, rendered in February of that year, condemning and forfeiting the property to the United States, as that of Charles M. Conrad, in proceedings under the confiscating act of July 17, 1862. The plaintiff and his father, when the plaintiff's deed was executed, were engaged in the rebellion, and so continued until the close of the war. The father was a member of the Confederate Congress, and the plaintiff was an officer in the Confederate army. The question presented for decision was, whether the title of the plaintiff, under his deed of May 6, 1862, was divested by the decree of February, 1865, condemning and forfeiting the land as the property of Charles M. Conrad, and the sale thereunder to the defendant, and the court, referring to and approving the language of *STRONG, J.*, in *Day v. Micou*, held that it was not, and reversed the judgment of the court below, which sustained the defendant's title. It will be noticed that in this case the land was confiscable as against the plaintiff, who, as has been stated, was an officer in the Confederate service, but having been seized and condemned as the property of Charles M. Conrad, the condemnation and sale did not, as the court decided, bar the plaintiff's title. We understand the case to decide the principle that where the property of A., under a title originating prior to the passage of the confiscation act, is seized, con-

demned and sold, in proceedings under these acts as the property of B., the title of A. is not divested thereby, although his title was derived from B., and although A.'s title was subject to confiscation, and might have been divested by seizure and sale, in appropriate proceedings for that purpose.

The record of the District Court was not a defense to this action, for another reason, viz. : The confiscation acts do not contemplate or authorize the confiscation of the property of a corporation, and no jurisdiction was acquired by the District Court to proceed for the forfeiture of the debt owing by the Phoenix Bank to the Bank of Georgetown. That the property of a corporation is not confiscable under the confiscation acts, was very precisely stated in the opinion of Mr. Justice STRONG in *Planters' Bank v. Union Bank*, 16 Wall. 496. The opinion upon this point was not, perhaps, essential to the decision made; but it cannot be supposed, in view of the importance of the subject and the frequent occasions upon which the court has been called upon to consider the scope and effect of the confiscation act, that the remarks of Mr. Justice STRONG upon the subject, in an opinion in which the whole court concurred, were made without full consideration, or without the acquiescence of his associates. And considering the question *de novo*, I fully concur in the opinion of the learned justice upon the point stated. The title of the act of July 17, 1862, indicates that it related to the punishment of natural persons and to the confiscation of the property of individuals who are rebels, within the ordinary meaning of the term. It was "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes." The first four sections of the act prescribe and regulate the punishment of persons committing treason, or engaging and assisting in the rebellion, and manifestly can have no application to corporations. Corporations cannot suffer death or be imprisoned, as a punishment for crime. The *fifth* section authorizes the seizure of the property of six classes of persons enumerated in the section: 1. Of any officer in the rebel army or navy. 2. Of the acting president and other officers of the so-called Confederate States. 3. Of the governor, members of the legislature, or judge, of any of the Confederate States. 4. Of persons who, having held any office of honor, trust and profit in the United States, shall thereafter hold any office in the Confederate States. 5. Of persons thereafter holding any office or agency

under the government of the Confederate States, or any of the several States of the Confederacy, subject to a proviso not necessary to be stated. 6. Of persons owning property in a loyal State, etc., who shall thereafter assist, and give aid and comfort to rebellion. The *sixth* section provides for the seizure of the property of persons who, having engaged in the rebellion, shall not cease to aid and abet the same after the expiration of sixty days, after proclamation made by the president. The confiscation acts do not authorize the seizure and confiscation of the property of all rebels. Under the act of August 6, 1861, it was only property acquired or used by the owner in aid of the rebellion, which was made subject to seizure and condemnation; and under the act of July 17, 1862, it was the property only of the persons specially mentioned in the *fifth* and *sixth* sections. It is doubtless true that corporations are persons, for certain purposes, in contemplation of law; and as a general rule, in construing penal or other statutes relating to persons, corporations will be deemed to be comprehended, "when the circumstances in which they are placed are identical with those of natural persons." *Beaston v. Farmers' Bank of Delaware*, 12 Pet. 134; *United States v. Amedy*, 11 Wheat. 412. But this is a rule of construction merely, and yields to an indication of a contrary intention derived from a consideration of the scope and purpose of the particular statute. We are of opinion that such indication does not exist in the confiscation acts. The statutes of 1861 and 1862 are *in pari materia*. They relate to the property of sentient beings possessing a will impelled by motives, and capable of forming an intent. As said by STRONG, J.: "Both of these acts had in view property of natural persons who were public enemies, of persons who gave aid and comfort to the rebellion, or who held office under the Confederate Government, or under one of the States composing it."

The District Court, upon the construction of the confiscation acts, in directing the seizure and decreeing the confiscation of the property of the Bank of Georgetown, acted wholly outside of its jurisdiction, and the entire proceedings, including the seizure, condemnation and distribution, were void, and constituted no justification to the defendant in paying over the fund to the marshal. The acts did not confer upon the District Court general jurisdiction to seize and confiscate enemies' property. It had no jurisdiction whatever to seize and condemn the property of corporations,

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but of natural persons only. That the case was not one within the jurisdiction of that court appeared upon the very inception of the proceedings. The information disclosed that the property proceeded against was the property of a corporation; the mandate of the court directed its seizure as the property of a corporation; and it was declared to be the property of a corporation in the final sentence of condemnation. Where a court has jurisdiction, it has a right to decide every question which occurs in the cause (*Elliott v. Pierson*, 1 Pet. 328), and an erroneous ruling or decision, in the course of the proceedings, does not render its judgment void; but a court authorized by statute to entertain jurisdiction in a particular case only, if it undertakes to exercise the power and jurisdiction conferred in a case to which the statute has no application, acquires no jurisdiction, and its judgment is a nullity, and will so be treated when it comes in question, either directly or collaterally. *State of Rhode Island v. Comm. Massachusetts*, 12 Pet. 657; *Wilcox v. Jackson* 13 id. 511; *Thompson v. Whitman*, 18 Wall. 457; *Confiscation Cases* [STRONG, J.], 20 id. 107; *Chemung Canal Bank v. Judson*, 8 N. Y. 254.

[Omitting minor points of evidence.]

We think the judgment should be affirmed.

Judgment affirmed.

All concur.

NOTE BY THE REPORTER.—Another case involving proceedings under the confiscation act is *Chapman v. Phoenix Nat. Bk.*, 85 N. Y. 437. Plaintiff owned shares of defendant's stock, the certificate whereof was issued to her in 1859, in her then maiden name, "Miss Verina S. Moore," which certificate she still holds. She then resided in Newberne, N. C. She received the dividends on the stock up to January 1, 1861, when she married Mr. Chapman. Up to December, 1865, she resided with her husband in Ashville, N. C., and in Talladega county, Ala., taking no part in the rebellion. In February, 1864, the U. S. marshal, under directions of the U. S. district-attorney, addressed a letter to defendant notifying it that he seized eighty-four shares of its stock and the dividends thereon belonging to "Ver. S. Moore, now or late of Newberne, N. C." A libel of information was then filed in the U. S. District Court describing the stock as in said letter, without giving the number of the certificate, and alleging that the property so seized belonged to "Ver. S. Moore, a rebel," without stating any residence, who, it was alleged, since the passage of the confiscation act of 1863, had acted as an officer of the rebel army, as a member of the Congress and as a judge, commissioner and agent of the Confederate States. The information was not verified. Such proceedings were had thereon that a judgment was entered by default, condemning the property which was described as belonging to "Ver. S. Moore," directing the bank to cancel the certificate issued to that person, the number of plaintiff's certificate being then for the first time given; to issue a new certificate and to pay the dividends to the clerk of the court, and directing the issuing of a writ of *venditioni exponas*. Defendant obeyed the directions in the decree. Plaintiff had no notice of the pendency of these proceedings. In an action to recover dividends held, that plaintiff's title to the stock was not affected by the confiscation proceedings; and that they constituted no defense. The court said: "The conclusion we have reached has ample justification in authority. In

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Winsor v. McVeigh, 98 U. S. 374, it was held that a sentence of a court against a party, without hearing him or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal, that the jurisdiction acquired by the seizure of property in a proceeding *in rem* for its condemnation for alleged forfeiture is not to pass upon the question of forfeiture absolutely, but to pass upon the question after opportunity has been offered to its owner and parties interested to appear and be heard upon the charges for which the forfeiture is claimed, and that to that end some notification of the proceedings, beyond that arising from the seizure, prescribing the time within which the appearance must be made, is essential.

"In *Day v. Micou*, 18 Wall. 156, it was held that in confiscation proceedings, under the act of 1862, the property and estate of persons not made parties to the proceedings remained unaffected by the decree of condemnation and the sale thereunder.

In *Conrad v. Waples*, 98 U. S. 379, certain real estate was seized and confiscated, under the same act, in a proceeding against Charles M. Conrad, as owner, and the decree of condemnation was held wholly invalid against his son, the real owner. So in *Risley v. Phenix Bank of N. Y.*, 83 N. Y. 318, recently decided in this court, certain property was confiscated in a proceeding against the Bank of Georgetown, as owner, and it was held that the decree of condemnation was wholly invalid against the plaintiff *Risley*, who was the owner at the time of the condemnation.

"It will be observed that in all these cases the identical property intended to be confiscated was seized, and the name of the supposed owner was in each case inserted in the information, and yet the proceedings were held invalid. The doctrine of these cases is that the proceeding under these acts is not merely *in rem* against offending property, so as to bind all persons, but that the right to condemn property under the acts depends upon the *delictum* of the owner, who must be brought into court, that he may have a hearing."

 MERCHANTS' NATIONAL BANK OF WHITEHALL V. HALL.

(88 N. Y. 388.)

Guaranty—construction of—continuing—release.

A wife assigned to a principal creditor of her largely insolvent husband a certificate of her stock in a corporation, "as a security for the payment of any demands" the creditors "may from time to time have or hold against" the husband. *Held*, that this covered demands subsequently arising as well as contemporaneous demands, and was not discharged by an extension of time of payment by the creditor by the renewal of notes in the ordinary course of business.*

ACTION to foreclose a lien on stock. The head-note and opinion show the facts. The plaintiff had judgment below.

E. Cowen, for appellant.

* See *Boehm v. Murphy* (46 Mo. 57), 2 Am. Rep. 485; *Birdsell v. Hancock* (22 Ohio 28, 177), 30 Am. Rep. 573.

Samuel Hand, for respondent.

FOLGER, C. J. The difficulty presented by this case is to determine just what the plaintiff and defendant agreed to when she made and received the assignment of the stock.

The first question is, did they mean that it should be a security for debts of Hall that had arisen before the making of the pledge? It is true, as claimed by the defendant, that the instrument is prospective, and that such an agreement as this does not refer to past transactions in the absence of language to that effect. The application that the defendant seeks to make of this rule is, that the guaranty applies to no debt that arose before the agreement was made. The agreement does not in terms name or describe debts made before the pledge. It does not in terms name or describe acts that were done or could have been done, only before the pledge. It does speak of acts which, though begun before the agreement, could be continued and thus be acts done after its making. When it provides for demands that the plaintiff may from time to time have and hold against Hall, it speaks of the act of having and holding a demand; and that is an act that could be done after the making of the agreement, though the demand arose before, and though as an act of having and holding it, it was begun before. If Hall had, before the date of the agreement, made his note to a stranger, and after that date the plaintiff had become the assignee of the note, the plaintiff would have had and held it after the making of the pledge. The demand thereon would have fallen within the language of the agreement; whether within the intention of the parties to the agreement is another question. It would have been a demand had and held by the plaintiff from time to time (that is, at any or some time during the running of the agreement), against Hall, and so would have been literally one of the demands spoken of by the instrument. It is plain then that the date of origin of the demand is not the test whether the pledge applies to it. The act of having and holding is. Now that act (the act of having and holding after the pledge was made) might be done as well of a debt that arose before the pledge was made as of a debt that arose afterward, and notwithstanding there was also a having and a holding of the debt before. We see no reason in the language of the assignment for taking from the effect of its demands that arose before it was made, if the plaintiff had and

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held them after it was made. The defendant concedes that the phrase, "any demands the Merchants' National Bank may have," does apply to debts existing at the time of making the pledge. She insists that the phrase "from time to time" necessarily refers to future debts, and thus limits the effect of the phrase "may have." So it might, if that was the only proper and necessary reference of that phrase. It refers no more to debts than it does to the act of having and holding them. So it is not the debt only that it may be in the future of the agreement, but also the act of having and holding; and that act may be of that future time, though it be a holding of a debt created before the agreement.

It is said by the defendant that there is no presumption that she undertook, without any consideration, to pay Hall's past debts when the fair construction of the language applies it more properly to future loans. This assumes the matter in debate, viz.: whether the fair interpretation of the language does apply it more properly to future loans. We have endeavored to show that it does not. So far as the existence of any consideration for the agreement is to be gathered from the terms of it, it is one as much for the continued holding of past-made debts as for debts to be made afterward. There is no promise in the paper of loans, advances or credits. Nor does the paper name a condition of that kind. To be sure, the ordinary guaranty for future advances is more commonly to be met with than one for past debts. Yet a pledge of lands by mortgage, or of personal property by assignment, as a security for the indebtedness of another already incurred, is not a strange thing. The terms of this agreement and the course of affairs among men do not forbid a presumption of the latter being the purpose of the parties any more than they do the other. It is urged that if the hypothecation applied to past debts, the bank, the next day after it was made, could have sold the stock to pay Hall's debts. This position would be more formidable, if with the interpretation of the defendant the agreement did not show her exposed to the same disaster. Grant that the paper applies to future debts alone. It does not provide for their amount, or kind, or time of credit. Hall might, the day after the assignment was made, have drawn his sight draft or his bank check in favor of the plaintiff to any amount and have thus put it in the power of the plaintiff to sell the stock at once and swamp it.

We think that the language of the agreement is to be interpreted

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as applying the pledge to demands against Hall, held and owned by the bank after the making of it, though the debts arose before. To what extent courts will go in applying language to past transactions may be seen in *Nares v. Rowles*, 14 East, 510.

The second question is, did the gift of time by the plaintiff to Hall, for payment of any debts, discharge the stock from liability? The agreement by which the stock is hypothecated makes it a continuing security. The words "any" and "may have or hold from time to time," clearly have that effect. *Douglass v. Reynolds*, 7 Pet. 113; *Agawam Bank v. Strever*, 18 N. Y. 502. The effect of a continuing security is that it applies to any future transaction between the parties that is within the limits of the agreement. The instrument before us is as wide in limit as it could well be. It does indeed specify the party for whose benefit it is made, and the person, Hall, whose dealings with that party are guaranteed. It also engages for the payment, rather than the collection, of the demands against Hall; though that is hardly a narrowing of the liability of the stock. By specifying the plaintiff, a National bank, as the party for whose benefit it is made, an implication arises that the dealings of Hall and the bank are such as are usual in the business of a bank of loan and discount with a borrower from it. This might sometimes operate to limit the liability of the guarantor. Otherwise than by these there are no limits expressed in the assignment by which the operation and effect of it are held in. It specifies no kind of demand, no amount, no length of time of any indebtedness, no length of time for which the stock might be liable. In the last particular it was susceptible of a limit being put upon it, at any time after it was made, at the will of the defendant. She might, by giving notice, have restricted it to the demands actually held by the bank at the time of notice. *Mason v. Pritchard*, 2 Camp. 436; 18 N. Y. *supra*. As it reads, it is unlimited in period. As it particularizes no demand, it applies to "debts successively renewed." *Merle v. Wells*, 2 Camp. 413. We do not suppose that these words of Lord ELLENBOROUGH in that case meant the same as the technical renewals of a matured note by a bank. Those of Judge STORY in *Douglass v. Reynolds*, *supra*, at page 125, come nearer, if not quite to it: "This being a continuing guarantee, in which the parties contemplated a series of transactions, the defendants must necessarily have understood that there would be successive advances, acceptances and indorsements, which

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would be renewed and discharged from time to time." It is not to be denied that a guarantor may be held for all that is done by or for his principal that was contemplated by the contract. *N. H. Sav. Bk. v. Gill*, 16 N. H. 578. Nor is it to be denied that it is contemplated by a continuing contract of guaranty that the creditor and the principal will carry on the business provided for in the manner in which it has theretofore, to the knowledge of the guarantor, been transacted. *Id.*; *Reddish v. Watson*, 6 Ohio, 510. Further than that, the contract of continuing guaranty contemplates that the unparticularized transactions of the creditor and the principal will be carried on in the usual course of the business provided for. *N. H. Ch. Bk. v. Mitchell*, 15 Conn. 206; *Combs v. Woolf*, 8 Bing. 156, seems to recognize such principle; and so does *Howell v. Jones*, 1 Cr. Mees. & Rosc. 97. See also, *Fox v. Parker*, 44 Barb. 541. The creditor here is a National bank and the dealings anticipated were in a banking business. The general course of business in a community including the universal practice of banks, is a matter of which the courts may take judicial notice. 18 N. Y. 512. It is a practice of banks, either with favored customers or with debtors who are not able to pay at maturity, to renew the obligations on payment of a new discount. If the customer is in good credit, it is just as profitable and quite as convenient, to take a new note, without payment in money of the old one, and to receive from him the price of another discount. If the debtor is not in good credit it is expedient sometimes to keep his debt along by renewals, taking from him the discount at each extension. These are gifts of time. It was in this way that the plaintiff gave time to Hall. We have a right to assume that Hall was one of these classes; that the bank and he sought to provide for such a course of business; that the hypothecation was got to make it safe for the bank and give credit to Hall; and that it contemplated such a series of transactions. The defendant put into the possession and power of use of the bank and Hall her stock and the assignment, without any express restriction thereon. The legal presumption in such a case is that the parties intrusted with it were authorized to use it in any legitimate way in which it could be made subservient to their purposes. 18 N. Y. 513. She was not perpetually bound by the pledge she had made as a continuing guaranty, and could have terminated her responsibility any time by notice. *Id.* Whenever she should have

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done that, the liability of her stock would have been that of a specific guarantor for the payment of the very demands then existing, and she would then have had a right that they be not changed or extended so as to interfere with her right to perform and be subrogated. It was not so with her subsisting guarantee, made in contemplation of the course of dealing that was had under it, and to which she is not to be taken to have been a pre-assenting party.

So far we have gone upon the reading only of the instrument of pledge and the presumptions arising from what is found in it. When we look into the facts as they existed when the parties made their agreement and construe the paper by the application to it of them, our interpretation is sustained. The defendant was a married woman, the wife of the debtor Hall. He had some connection with the plaintiff closer than a borrower merely. The plaintiff was a bank of loan and discount. It was located in an interior village. Presumably its capital was small — not over \$200,000. Hall was liable to it in one form and another in over \$72,000, or over one-third its presumed capital. His credit was gone. His means were not enough to set it up again. He and others for whom he was liable, or who were liable for him to the plaintiff, were on the verge of actual insolvency and legal bankruptcy. The plaintiff was then holding debts against him, for which it afterward took, as collateral security, a pledge of shares of its own capital stock. Such was its own financial state that that stock on sale only realized forty cents on the dollar. It is plain that the condition of the bank was such that the main thought of the managers of it must have been how to save it from ruinous loss by Hall. The situation was such as is often known to the practical or judicial observer, and so is the remedy that is usually thought for and applied. The safety of the large accrued indebtedness depended upon the continuance of the debtor in business, in hope of his future success. There was no thought of payment immediately or soon. The practicable methods were to give time on his debts; to give him continued and regularly recurring support, favor and lenity. This was so doubtful in prospect as to require some consideration to move the creditor thereto. So much of the ready means of the creditor was already in the indebtedness, as that funds were not in hand for an actual loan of money on new obligations, and an actual payment of old debts with that loan, though sufficient security had been offered. When in such case the debtor is found furnishing col-

lateral security in pledges of property by relatives or friends, or guaranties of personal liability, the inference is not strained, it is ready, that the attempt is to be made to tide the debtor over his embarrassments, to keep his head above water until times shall change, business revive, property enhance, depreciated assets improve in value and be converted. It is idle to suppose that in such circumstances the plaintiff and Hall were about to start a new-formed business relation, and that the method, unusual in such cases, of the pledge of the capital stock of a manufacturing corporation, was taken for the safety of a prospective business. The inference is that the pledge of this stock was sought and obtained as a partial or complete reliance, while the bank, by renewals and extensions, should carry along the indebtedness of Hall. It is plain then that it was meant by Hall and the bank as a security for his indebtedness then existing, and that thereafter to arise, in whatever form the demands might take, and after whatever renewals, extensions and changes. Compare this state of facts with the terms of the paper, and they join to support such a presumption. It may be, that the defendant had not precise knowledge of the facts as they then existed ; yet it is to be inferred that she had a general understanding of the state of affairs, and that she executed the assignment in view of them. The answer avers that the instrument was got from her by unreal pretenses. The testimony discloses nothing of it. No findings are asked to that end. And it is to be presumed that the assignment was obtained from her fairly, and in view of the condition of affairs then existing. She is bound therefore by such a construction of her agreement as arises fairly from the circumstance in which it was used by her authority.

It is well to say that we have given consideration to the authorities cited for the defendant. The cases cited on the first question we have considered go upon the language used in the contract there, and upon the reasons drawn from the state of facts peculiar to them. The cases cited on the second question are based upon a principle not denied, that a gift of time to a principal debtor discharges the surety ; but it will be found that in them " new arrangements, not contemplated at the time of entering into the guaranties by any of the parties, are introduced ; and thus the state of circumstances altered without the contemplation and without the consent of one of the parties." In these cases of guaranties, the decision in one

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does not aid greatly in the disposition of another, save as some principle is evolved applicable to all alike. See per STORY, J., 7 Pet., *supra* ; per PARK, J., *Hargreave v. Smea*, 6 Bing. 244 ; *White's Bank v. Myles*, 73 N. Y. 335 ; s. c., 29 Am. Rep. 157. We have not gone counter to any principles laid down for the reading of un-perspicuous contracts, and those are the principles that apply to these contracts of guaranty as well as to others. *Belloni v. Freeborn*, 63 N. Y. 383. We have felt the importance of the case. We state as the conclusion of our judgments, that the courts below made no error.

The judgment appealed from should be affirmed.

Judgment affirmed.

All concur, except DANFORTH, J., not voting.

SIBBALD V. BETHLEHEM IRON COMPANY.

(63 N. Y. 378.)

Agency — revocation — right to compensation.

When a broker has been allowed a reasonable time to produce a purchaser and effect a sale, and has failed so to do, and the principal in good faith and fairly has terminated the agency, and sought other assistance by the aid of which a sale is consummated, the fact that the purchaser is one whom the broker introduced, and that the sale was in some degree aided by his previous unsuccessful efforts, does not give him a right to commissions.

ACTION for commissions. The opinion states the facts. The plaintiff had judgment below.

Albert Stickney, for appellant.

Thomas Hy. Edsall, for respondent.

FINCH, J. The evidence satisfactorily shows that the defendant employed the plaintiff to sell the steel rails of the former's manufacture to the Grand Trunk Railroad Company. The existence of such a contract was strenuously denied on the part of the appellant, but the proofs establish it and leave it without substantial

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contradiction. The plaintiff swears that in December, 1873, he met and was introduced to Mr. Hunt, the president of the defendant corporation, and was requested by him to use the plaintiff's exertions and interest in selling steel rails of the Bethlehem Iron Company's make, and particularly to the Grand Trunk Railway of Canada, and that the plaintiff agreed to do so if he could. Hunt was afterward examined and does not contradict this statement. Indeed he almost admits it. He says, "I presume I was introduced to Mr. Sibbald in December, 1873. I have no recollection of it. After my introduction to him I may have called upon him in his office in New York. He says I did, and I accept his statement up to his sale of 14th of April." Mr. Evans, in whose presence the conversation detailed by plaintiff took place, was also examined as a witness by the defendant. He admits the meeting on that occasion; that he introduced Sibbald to Hunt as a man engaged in selling steel rails; that several railways were named as purchasers from plaintiff, "the Grand Trunk doubtless among them;" and then he adds, "I do not remember that any thing definite was said as to his selling any rails for the Bethlehem Co., but there may have been."

Upon this state of facts it is very evident that there was a general employment of the plaintiff by the defendant to sell its rails so far as he was able, and especially to the Grand Trunk Railway, with whose purchasing officers he was supposed to be in communication and to have influence. It follows that the first alleged error committed upon the trial, that the court refused a request to direct a verdict for the defendant on the ground that the plaintiff had not proved as to the transaction in suit any employment by the defendant, cannot be so regarded. The general employment was sufficiently definite and broad to have related and applied to the sale finally made, if indeed that resulted from plaintiff's influence and exertion. Nor do we see any fault in the charge of the court in this connection, that it was immaterial whether the broker was originally employed, or whether, after he had brought the thing about, the principal availed himself knowingly of the fruits of the action of the broker. This is only saying that the contract of employment may be established either by proof of an express and original agreement that the services should be rendered, or by facts showing, in the absence of such express agreement, a conscious appropriation of the labors of the broker. Indeed, the learned coun-

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sel for the defendant very fairly and justly concedes that the contract may be established in some cases "by a mere acceptance of the labors of a broker."

It follows also that there was no error in the further charge of the court, that the only remaining question was whether plaintiff was the producing cause of the sale. Having been employed to make it, the only remaining inquiry was of necessity whether he did make it either directly, or as its efficient and producing cause. That inquiry brings up for our consideration what the plaintiff in fact did, and what inferences are to be justly drawn from the attendant circumstances. The question, simple up to this point, grows rapidly difficult and complicated, partly by reason of the inherent uncertainty and ambiguity of the subject itself, and partly, perhaps, because of a wide range of judicial discussion not always entirely harmonious. The learned judge who tried the case at the Circuit, in his charge to the jury, realized and explained the difficulty of applying the appropriate legal rules to the particular facts of transactions like that under discussion.

It may aid therefore to clearness of statement and accuracy of conclusion, and perhaps remove some elements of debate, if we consider the legal attitude of a broker employed to buy or sell property, and his relative rights and duties as the basis of his claim for compensation.

The duty he undertakes, the obligation he assumes as a condition of his right to demand commissions, is to bring the buyer and seller to an agreement. In that all the authorities substantially concur, although expressing the idea with many differences of phrase and illustration. The description and definition of a broker involves this view of his duty. Story says, "The true definition of a broker seems to be that he is an agent employed to make bargains and contracts between other persons in matters of trade, commerce or navigation for a compensation commonly called brokerage." Story on Agency, § 28, p. 25. In *Pott v. Turner*, 6 Bing. 702, 706, a broker is more tersely, and quite accurately, described as "one who makes a bargain for another and receives a commission for so doing." In *Barnard v. Monnot* it was said, that the duty of the broker consisted in bringing the minds of the vendor and vendee to an agreement. 34 Barb. 90. In *Wylie v. Marine National Bank*, 61 N. Y. 416, it was held that to entitle the broker to commissions, he must produce a purchaser ready and willing to

enter into a contract on the employer's terms. This implies and involves the agreement of buyer and seller, the meeting of their minds, produced by the agency of the broker. In *Moses v. Bierling*, 31 N. Y. 462, it was declared that the authorities clearly establish the proposition that until the broker has faithfully discharged the obligation assumed in the contract with his principal, he is not entitled to his agreed commission, and that obligation is fulfilled only when he produces a party ready to make the purchase at a satisfactory price. In *Glenworth v. Luther*, 21 Barb. 147, it was declared that the commissions were earned when the broker produces to his principal a party with whom the owner is satisfied, and who contracts for the purchase at an acceptable price. It was not meant by these cases, and we do not mean, that the broker must of necessity be present and an active participator in the agreement of buyer and seller when that agreement is actually concluded. He may just as effectually produce and create the agreement, though absent when it is completed and taking no part in the arrangement of its final details. And it is to describe such instances that courts have used a different form of expression, entirely accurate in its proper application, but capable of being warped from its obvious meaning. In *Lloyd v. Matthews*, 51 N. Y. 132 the phrase used was that the broker was entitled to reward when the sale was effected through his agency as the procuring cause. And in *Lyon v. Mitchell*, 36 N. Y. 237, the broader language is used that his efforts must have led to the negotiations that resulted in the purchase of the vessel. But in all the cases, under all and varying forms of expression, the fundamental and correct doctrine is, that the duty assumed by the broker is to bring the minds of the buyer and seller to an agreement for a sale, and the price and terms on which it is to be made, and until that is done his right to commissions does not accrue. *McGavock v. Woodlief*, 20 How. 221; *Barnes v. Roberts*, 5 Bosw. 73; *Holly v. Gosling*, 3 E. D. Smith, 262; *Jacobs v. Kolff*, 2 Hilt. 133; *Kock v. Emmerling*, 22 How. 72; *Corning v. Calvert*, 2 Hilt. 56; *Trundy v. N. Y. & Hartf. Steamboat Co.*, 6 Robt. 312; *Van Lien v. Burns*, 1 Hilt. 134.

We have been thus particular in the examination and statement of the rule, because of a possible tendency growing out of a variety of circumstances and modified forms of expression, to give it an extent and meaning not at all intended.

It follows, as a necessary deduction from the established rule,

that a broker is never entitled to commissions for unsuccessful efforts. The risk of a failure is wholly his. The reward comes only with his success. That is the plain contract and contemplation of the parties. The broker may devote his time and labor, and expend his money with ever so much of devotion to the interest of his employer, and yet if he fails, if without effecting an agreement or accomplishing a bargain, he abandons the effort, or his authority is fairly and in good faith terminated, he gains no right to commissions. He loses the labor and effort which was staked upon success. And in such event it matters not that after his failure, and the termination of his agency, what he has done proves of use and benefit to the principal. In a multitude of cases that must necessarily result. He may have introduced to each other parties who otherwise would have never met ; he may have created impressions, which under later and more favorable circumstances naturally lead to and materially assist in the consummation of a sale ; he may have planted the very seed from which others reap the harvest ; but all that gives him no claim. It was part of his risk that failing himself, not successful in fulfilling his obligation, others might be left to some extent to avail themselves of the fruit of his labors. As was said in *Wylie v. Marine National Bank*, 61 N. Y. 416, in such a case the principal violates no right of the broker by selling to the first party who offers the price asked, and it matters not that sale is to the very party with whom the broker had been negotiating. He failed to find or produce a purchaser upon the terms prescribed in his employment, and the principal was under no obligation to wait longer that he might make further efforts. The failure therefore and its consequences were the risk of the broker only. This however must be taken with one important and necessary limitation. If the efforts of the broker are rendered a failure by the fault of the employer ; if capriciously he changes his mind after the purchaser, ready and willing, and consenting to the prescribed terms, is produced ; or if the latter declines to complete the contract because of some defect of title in the ownership of the seller, some unremoved incumbrance, some defect which is the fault of the latter, then the broker does not lose his commissions. And that upon the familiar principle that no one can avail himself of the non-performance of a condition precedent, who has himself occasioned its non-performance. But this limitation is not even an exception to the general rule affecting the broker's right, for it goes

on the ground that the broker has done his duty, that he has brought buyer and seller to an agreement, but that the contract is not consummated and fails through the after-fault of the seller. The cases are uniform in this respect. *Moses v. Burling*, *Glentworth v. Luther*, *Van Lien v. Burns*, *supra*.

One other principle applicable to such a contract as existed in the present case needs to be kept in view. Where no time for the continuance of the contract is fixed by its terms, either party is at liberty to terminate it at will, subject only to the ordinary requirements of good faith. Usually the broker is entitled to a fair and reasonable opportunity to perform his obligation, subject of course to the right of the seller to sell independently. But having been granted him, the right of the principal to terminate his authority is absolute and unrestricted, except only that he may not do it in bad faith, and as a mere device to escape the payment of the broker's commissions. Thus, if in the midst of negotiations instituted by the broker, and which were plainly and evidently approaching success, the seller should revoke the authority of the broker, with the view of concluding the bargain without his aid, and avoiding the payment of commissions about to be earned, it might well be said that the due performance of his obligation by the broker was purposely prevented by the principal. But if the latter acts in good faith, not seeking to escape the payment of commissions, but moved fairly by a view of his own interest, he has the absolute right before a bargain is made while negotiations remain unsuccessful, before commissions are earned, to revoke the broker's authority, and the latter cannot thereafter claim compensation for a sale made by the principal, even though it be to a customer with whom the broker unsuccessfully negotiated, and even though, to some extent, the seller might justly be said to have availed himself of the fruits of the broker's labor. Thus in *Satterthwaite v. Vreeland*, 3 Hun, 152, it was held that the broker earned his commissions by making a sale on the terms fixed by the principal while the authority continued. Judge DANIELS said, and we think correctly, that "to maintain a claim by the broker for his commissions, it was necessary that he should be able to show that he had either procured a purchaser for the property at the price for which he was empowered to sell, or that the defendant had deprived him of the opportunity to do so while the privilege lasted." In that case, after the termination of the broker's authority, the principal sold to the person with whom

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the broker had negotiated at a less price ; and it was held that he had a right to do so, unless his action was a mere device to escape the payment of commissions. Any other rule would prolong a contract with a broker indefinitely. No man could know when he was freed from its obligations, and a liability would be imposed not contained in the terms of the contract, and essentially perverting its legitimate construction.

We may now apply these principles to the facts of the present case. The plaintiff began his efforts to sell the steel rails of the Bethlehem Iron Company very soon after authority was given him. In the latter part of December, 1873, he went to Canada, and proposed to Mr. Brydges, who was managing director of the Grand Trunk Railway, to sell him the steel rails of the defendant's manufacture. Brydges declined the proposition, saying he was not then in the market, but when he was, would let plaintiff know. On the 5th of January, the defendant having reduced its price and fixed it at \$108 per ton, plaintiff wrote to Brydges telling him of the reduction and that the defendant offered to sell at \$108 currency. At the close of his letter the broker adds, "I think a firm cash offer of \$105 to \$107 currency would be accepted by the Bethlehem Iron Company." This suggestion is severely criticised by the appellant's counsel and with some apparent reason. The broker was bound to maintain a steady fidelity to the interests of his principal. He had no right to sacrifice the interest of the latter for the benefit of the buyer, and yet it may well be that buyer and seller could only be brought to the consent of a bargain by some moderate concession as to price, and that the broker acted fairly, in view of his talk with Hunt about a reduction, in making the suggestion which is assailed as a violation of duty. On the 9th of January plaintiff again wrote Brydges that defendant was anxious for an order, and inclined to accept a reduction. On February 5th the broker again wrote substantially the same thing. Between the 20th of that month and the 8th of March he was in Montreal having other business for other parties and accomplished nothing. On the 7th of April he received a telegram from Brydges asking the price of one thousand tons of steel rails, "either of English or American manufacture," for immediate delivery. This seemed a hopeful inquiry. Plaintiff, after getting a price from Evans, telegraphed an offer for the defendant at \$106 currency. At the same time the plaintiff wrote Brydges, repeating the offer but also trans-

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mitting offers by other parties of English rails. What that meant, and what its effect on defendant's interests was, is made plain by the further fact that no order came for the defendant's rails, but Sibbald bought for the Grand Trunk, on the 11th of April, five hundred and twenty tons, and on the 14th of April eighty tons of English rails. Meanwhile, and on the 11th of April, he caused to be sent to the Grand Trunk Railway a broken piece of defendant's rail to show the quality of the steel. On the 21st of April he wrote to Hannaford, the chief engineer of the Grand Trunk, explaining the object of sending the fractured rail, and that the defendant would roll to that company's section, and if required, punch or bore holes round in rails.

On or about the 23d of April, 1874, plaintiff received a telegram from the Grand Trunk Railway, asking upon what terms one thousand tons of steel rails of the Bethlehem Iron Company would be delivered at Portland. On the same day he telegraphed to the defendant to know the lowest price, and stating that the rails inquired about were for the Grand Trunk. Just such an incident had occurred once before, as we have seen, and nothing had come of it. At that time a price had been named but no purchase had resulted. Was it unreasonable if the patience and confidence of the principal became exhausted? Mr. Hunt telegraphed that he would see plaintiff the next day. He did so, and in that interview declined to name a price, or negotiate further through plaintiff. On that same day the latter telegraphed and wrote to the Grand Trunk officers that the Bethlehem company declined to name a price. This ended the agency, terminated the contract; left each party at entire liberty, if the action of the defendant was within its legal rights and exercised fairly and in good faith.

The efforts of the plaintiff had been thus unsuccessful. He had not made a bargain, he had failed to bring buyer and seller to an agreement, after having had four months of opportunity, and now his authority was terminated without his having earned commissions. Very plainly he had acquired no right to them, and could acquire no right to them from any thing which might happen in the future, unless upon the sole and only ground that the defendant terminated the agency in bad faith and as a device to get the benefit of plaintiff's labors without paying for them. It is difficult to see how that could be maintained, and yet in his charge to the jury, the trial judge called attention to the claim that on this same 23d of April, Evans, who as broker made the final sale, and who had

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learned on the street that the Grand Trunk Railway was in the market for steel rails, wrote that fact to the defendant and began the negotiations which ended in a sale. He did write such a letter to Hunt, but it is plain that the latter did not receive it until the 25th at the earliest, and not until after he had terminated plaintiff's agency. He could not therefore have been influenced by it, and the evidence of bad faith had nothing left on which to rest except the fact of the actual sale to the Grand Trunk Railway on the 13th of May, which sale was made through Evans and his brokerage paid.

Keeping in view this state of facts, we are prepared to consider certain other alleged errors in the final disposition of the case. The court was asked to direct a verdict for the defendant on the ground that although the plaintiff had first applied to the defendant for the price of the rails, the defendant was entirely at liberty to refuse his services and make a sale itself, directly or through another broker. The request was refused. We cannot quite say that this was error in view of the possible question of bad faith in terminating the agency. Slender as may have been its foundation, there was perhaps enough in the circumstances of the case and the facts of the transaction to make it proper to submit that question to the jury. It was a question peculiarly within their province, and which the court could hardly be justified in withholding from their consideration.

The court was then asked to charge that the defendant, under the circumstances, had the right to refuse to use the services of Mr. Sibbald, if the action was taken in good faith, without any intent to deprive him of his commission. The proposition involved in this request was, as we have already shown, entirely accurate and sound, and should have been so presented to the jury. The trial judge however was unwilling to so charge without adding a material qualification. He said, "I charge that proposition, but I charge it with a qualification, that the defendant had no right to refuse to avail itself of those things which the broker had done and then, indirectly — no matter whether in good faith or bad faith — by other channels, avail itself of the efforts of the broker with whom it has declined to continue the negotiation." There was an exception both to the refusal to charge and to the qualification added.

It is apparent that the request and the charge, taken together, plainly instructed the jury two things; first, that a seller cannot,

even in good faith, terminate the authority of a broker and effect a sale afterward through other agencies, and freed from any liability to the broker, if in the making of such after-sale the latter's previous unsuccessful efforts are in fact useful and aid and assist in the final bargain ; and second, that the circumstances of the case were such as to justify the inference that in the sale actually made the seller did in fact avail himself of the previous labors of the broker. This last proposition, without being distinctly asserted, was plainly assumed as the basis upon which the qualification of the request to charge rested and was rendered necessary. The practical result of the instruction thus given was in hostility to the conclusions we have derived from the authorities. It made immaterial the good faith of the defendant in terminating the authority of the broker, and explicitly denied such right as affecting commissions, if the after-sale was in fact aided and assisted by the plaintiff's previous unsuccessful efforts. The test of the right to recover is changed from the question of the principal's good faith in terminating the agency, to the question whether, notwithstanding that fact, the new and independent sale was helped and benefited by the previous action of the broker. The logical result of such a doctrine would be to prevent the defendant from ever making a sale of steel rails to the Grand Trunk Railway, except on condition of paying a commission to the plaintiff. For the one only useful thing which he did was to introduce the Bethlehem rails to the notice of that railway company. There could be no sale thereafter which would not be as much due to such original act of the broker as the one in question. It could always be said with equal truth that the iron company was availing itself of the broker's labor. The doctrine asserted permits a recovery for unsuccessful efforts, for trying to effect an agreement without accomplishing one, for merely asking a purchaser to buy without getting his assent, because though the agency had ended without commissions earned, a later and independent negotiation was probably easier and more likely to succeed by reason of such previous efforts. The charge had a clear tendency to mislead the jury. Because the broker originally brought the Bethlehem rails to the notice of the Grand Trunk purchasing officers, and thereafter accomplished nothing more than to lessen the principal's price and sell the rails of its rivals to the proposed customer, he is held entitled to recover commissions on a sale made without his intervention and after his agency had been fairly and lawfully terminated. Grant that what he did may justly

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be said to have aided in the making of the after-sale, yet that does not furnish ground for recovery, as we have already seen. If it did, such an agency might pass utterly beyond the principal's control. The trial judge, in the earlier part of his charge, had stated the general rule correctly, and as we hold it should be. He said to the jury, "If you find from the evidence in any given case, that the broker has failed to carry out any particular transaction, and that his efforts, although he may have introduced the parties, have terminated, and that he has not succeeded in making the trade, then the principal has a perfect right to resort to other sources for the purpose of effectuating that trade." If the charge had stopped here no error would have been committed. But it did not stop here. At its very close, and as the last words left with the jury, the doctrine, before correctly announced, is qualified by the introduction of a new and wrong element which could scarcely fail to lead the jury astray. It not only denied that unearned commissions were finally cut off by a termination of the broker's authority exercised in good faith, but confusing the essentially different ideas of an endeavor to make some sale, and negotiations about a particular sale, assumed that the last existed when the authority terminated, and on that unwarranted assumption asserted the right to commissions on the sale actually made. He should have submitted the question of good faith in terminating the agency to the jury, and told them if they found that fact, that no commissions could accrue on the after-sale, however much in making it the seller availed himself of the previous labors of the broker.

If after the broker has been allowed a reasonable time, within which to produce a buyer and effect a sale, he has failed to do so, and the seller in good faith and fairly has terminated the agency and sought other assistance by the aid of which a sale is consummated, it does not give the original broker a right to commissions, because the purchaser is one whom he introduced and the final sale is in some degree aided or helped forward by his previous unsuccessful efforts. If the charge was intended to mean this, and no more than this, the language chosen was unfortunate, for its direct tendency was to convey to the jury an entirely different idea and one with which we do not concur. For this error the judgment should be reversed.

Judgment reversed ; new trial granted, costs to abide the event.

Judgment reversed.

All concur, except RAPALLO, J., absent.

GARWOOD V. N. Y. CENTRAL AND HUDSON RIVER RAILROAD
COMPANY.

(83 N. Y. 400.)

Water-course — riparian rights — diversion for supplying locomotives.

An upper riparian owner on a stream has no right to divert the water, by pipes and reservoirs, for the use of his locomotive engines, to the detriment of a lower proprietor, a mill owner; and such conduct may be enjoined.*

ACTION to restrain diversion of water. The head-note discloses the case. The injunction issued below.

Samuel Hand, for appellant.

Moses Taggart, for respondent.

DANFORTH, J. The argument in behalf of the appellant raises no doubt as to the correctness of the judgment rendered by the Supreme Court, or its conformity to well-settled rules of law and equity. The diversion of the water is conceded; the jury have found that it was injurious to the plaintiff; he was therefore entitled to damages already sustained. It was continuous and under a claim of right; and to prevent further injury preventive relief was proper, for without it there would be vexatious litigation and multiplicity of suits. Story Eq. Jur., vol. 2, § 927; *Gardner v. Newburgh*, 2 Johns. Ch. 162; 7 Am. Dec. 526; *Swindon Water-works Co. v. W. & B. Canal Co.*, L. R., 7 Eng. & Ir. App. 687; *Campbell v. Seaman*, 63 N. Y. 568; s. c., 20 Am. Rep. 567. The plaintiff has obtained nothing more; nor has the court in its decision gone beyond the issues in the action. In measuring the rights and obligations of the defendant, it was treated as a riparian proprietor, for the purpose of enjoying the powers especially granted to it, and such as might be necessary to carry those powers into effect. This was proper in view of the concession by the plaintiff that the defendant was the owner of the land upon which the water was drawn. How it became such owner, whether by purchase or by proceedings under

* See *City of Emporia v. Soden* (25 Kans. 598), 37 Am. Rep. 385.

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the statute (Laws of 1850, chap. 140, § 14), does not appear. The court therefore was not called upon to determine what the defendant's position would have been if the lands had been acquired under the statute, *supra*, and properly regarded the question as one to be determined by the law regulating the rights of upper and lower riparian owners. That law is well settled, and in defining it the authorities cited by the parties to this appeal agree. Each has a right to the ordinary use of water flowing past his land, that is, *ad lavandum et ad potandum*, for domestic purposes and his cattle, although some portion may be thereby exhausted ; and this is so, without regard to the effect which such use may have upon the lower owner. The water may also be used for irrigation or for manufacturing purposes. The cases cited by the appellant are abundant to show this, but in every one the irrigation is of the land to which the right to use the water is an incident, or with which the manufacturing purpose is connected, but even this privilege cannot be exercised if thereby the lawful use of the water by a lower proprietor is interfered with to his injury. *Miner v. Gilmour*, 12 Moore P. C. 156 ; *Tyler v. Wilkinson*, 4 Mason, 397. Now in the case before us the defendant has done something more ; it has not been content with exercising this privilege ; it has diverted a considerable portion of the stream, not for any use upon the land past which it flows, but for the transaction of its business in other places and for purposes in no respect pertaining to the land itself. The pipes and reservoirs of the defendant are not laid or constructed for the mere purpose of detaining the water a short time, or applying it to machinery or other object upon the land itself, and afterward restoring it, but for facility in filling the defendant's locomotives, in order that they, with power generated from it, may pass as the interest of the defendant may require, to the east or west, returning no portion of it, even in the form of vapor, to the stream from which it was taken. So far as the plaintiff is concerned, it has carried away from his premises the water, as effectually as if it had been turned into another channel and discharged at Albany or Buffalo ; and from this, as the jury has found, he has sustained damage. Not only this, but it has been done under a claim of right by the defendant, which if acquiesced in by the plaintiff would in course of time ripen into a realty and defeat the incident of his property—the right of the plaintiff as riparian owner to have the water flow as it had theretofore been accustomed to flow. For in

that case, although the defendant could not claim the right as riparian proprietor, it might claim it by prescription; and to prevent this result, also, the plaintiff had a clear right to an injunction. The terms of the one granted are sufficiently well guarded. The defendant is "restrained" only "from diverting the water to the injury of the plaintiff." But the learned counsel of the appellant contends that inasmuch as both plaintiff and defendant require the water for artificial as distinguished from natural uses—the one as a power for mill purposes, the other as material or the means of producing power for railroad purposes, it may be abstracted by the defendant, even to the other's injury, although he concedes the rule would be different if the plaintiff required the water for natural purposes. It is difficult to see how such a distinction can be maintained. The plaintiff requires the current because its momentum supplies power. The defendant, as riparian owner, has no right to remove the water and so diminish it. If the defendant's use was for natural purposes, there might be some reason for giving it priority; but this is not pretended. To justify a use beyond that, a grant or license would be necessary. The defendant exhibits neither, but in its answer asserts that its use has been adverse to the plaintiff for more than twenty years. The evidence does not sustain the claim. As to it, therefore, the case presents no exception to the rule, that a riparian proprietor has no right to divert any part of the water of the stream into a course different from that in which it has been accustomed to flow, for any purpose, to the prejudice of any other riparian owner. This is the doctrine both of the common and civil law (3 Kent Com. 585), and it stands upon the familiar maxim, *sic utere tuo ut non lædas alienum*. In substance the defendant's claim is, that it has a right to use all the water it pleases; but it does not show the origin or foundation of the right. As the case stands, then, the defendant has diverted the water without right and to the plaintiff's injury; its use therefore could not be reasonable, and the inquiry desired by the defendant, as to whether it was or not, would not be applicable. To this effect also are the cases cited in behalf of the appellant. One much insisted upon is *Elliott v. Fitchburg R. R. Co.*, 10 Cush. 191. There also the defendants used the water of the stream "for furnishing their locomotive steam engines with water." The plaintiff sought to recover nominal damage without proof of actual damage; but the court held against him and the conclusion was that one riparian proprietor cannot main-

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tain an action against an upper proprietor for a diversion of part of the water of a natural water-course flowing through their lands, *unless* such diversion causes the plaintiff actual perceptible damage. It should be noticed that this was an action at law. *Earl of Sandwich v. Great Northern R. R. Co.*, 10 Ch. Div. 707, was a case in equity, and upon facts, with one exception hereafter noted, not unlike those now before us. The plaintiff asked both damages and an injunction. It was held that the purpose for which the water was taken was a lawful purpose ; that it was a reasonable enjoyment of the property of the defendant ; that the quantity taken was not excessive, and when the quantity returned to the stream was taken into consideration, the diversion was very slight. The court says : "Is that a case in which, if there is nothing else in it, the plaintiff could ask in this court for an injunction ? What injunction is he entitled to ? Is there any damage done to him ?" And again says : "Nothing that the defendants have done has exceeded the limits of their lawful right to deal with the water, and there is no particle of evidence to show that the plaintiffs have suffered injury, or that the right which they enjoyed and are entitled to enjoy has been in any degree invaded or interfered with by anything that has been done by the defendants ;" and the bill was denied. Now the exception which distinguishes the cases cited from the one in hand is this : Here the jury have found, on sufficient evidence, that the defendant has so diverted the water of the creek above the plaintiff as to "perceptibly reduce the volume of water flowing therein," and "materially reduce or diminish the grinding power of the plaintiff's mill," and in consequence thereof, that he has sustained damage to a substantial amount. In the cases cited similar facts are wanting. They lie at the foundation of the one before us and are sufficient to call for the interposition of a court, whether of law or equity.

[Omitting a minor suggestion.]

As the case now stands, no reason is shown why the judgment appealed from should not be affirmed, and that, I think, must be the result of this appeal.

Judgment appealed from affirmed, with costs.

Judgment accordingly.

All concur.

McCARNEY V. PEOPLE.

(83 N. Y. 408.)

Criminal law — trial — receiving evidence subject to striking out.

On a criminal trial the prosecuting officer offered in evidence a telegram, stating that he expected to prove that the prisoner knew the meaning of certain marks on it, and that if he failed, he would consent to its being struck out. It was received under objection. The prisoner was not connected with it, but his counsel did not move to strike it out, nor ask the court to instruct the jury to disregard it. *Held*, that its reception was not error.

CONVICTION of grand larceny. The opinion states the facts.

A. G. Rice, for plaintiff in error.

Robert C. Titus, district-attorney, for defendant in error.

FOLGER, C. J. [Omitting other matters.] A telegraphic message was taken in evidence, without then or afterward connecting the prisoner with it. When it was offered by the people, the district attorney stated that he expected to show that the prisoner was once employed where he would have had knowledge of the meaning of certain marks upon it, and that if he did not by further testimony connect the prisoner with it, he "would consent that the message be stricken out." The prisoner objected, on the ground that the prisoner was not then connected with it, and to the taking it "on the promise to strike it out" on failure to connect the prisoner with it. Thus the matter stood at the trial. We must take the place of the trial court at the stage of the proceedings, to determine whether it was in error in receiving the paper. Of course, if the district attorney had brought other proof that did connect the prisoner with the message, there would be no merit in the exception. He alleged that he could. Now if he had it in his power to do it, and the court knew that he had, it was a mere question of the order of proof, whether he should connect the prisoner with the message first, and prove the sending of it afterward, or *vice versa*. As the court did not know it, had it not the

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power to take the assertion of counsel that he expected to supply the link that would fasten to the prisoner? And was it not then also a mere question of order of proof? When it can be made to appear that other proofs will probably be given which will make the questioned evidence material, the court, in the exercise of discretion regarding the order of proofs, may allow an inquiry to be made. Per WOODRUFF, J., *Cass v. N. Y. & N. H. R. R. Co.*, 1 E. D. Smith, 525. The court need not at once exclude relevant testimony because it does not at once establish the issue to which it relates. Per ROBERTSON, C. J., *Murphy v. Boker*, 28 How. Pr. 263. See also, *Chapman v. Brooks*, 31 N. Y. 88. An ancient will may be read in evidence without proof of its execution, if there has been a possession under it of thirty years. Yet it is in the discretion of the judge to permit the will to be read as an ancient will before the needful possession under it has been proven. *Doe v. Passingham*, 2 C. & P. 440, cited per ALLEN, J., in *Staring v. Bowen*, 6 Barb. 115. Fraud in a vendor, to affect the vendee, may be proved before knowledge and concurrence in the fraud by the vendee is shown, though both be necessary to affect the latter. *Cotton v. Haskins*, Litt. Sel. Cas. 151, 152. A sworn copy of a deed, or other secondary evidence on the ground of loss, may be received without waiting for proof of existence or execution. *Allen's Lessee v. Parish*, 3 Ham. 107. And though the court know not, as seldom can it know, that the needful connecting proof will be forthcoming, may it not rest for a while on the assertion of reputable counsel of his expectation that he can produce it? And is it not then also a mere question of the order of proof? That court may base its action upon the avowals and declared purposes of counsel is shown by *Dunn v. People*, 29 N. Y. 523. It seems to us that it would too much hamper the trial courts in their proceedings, if they were much restricted in the exercise of a discretion in the order in which proof should be received. There must be a discretion rested in them, in such a case, for the convenience and dispatch of business, and often for a proper understanding and appreciation of the testimony. As was said by NELSON, C. J., in kindred matter, in *Morris v. Wadsworth*, 17 Wend. 103, 119, the question must always depend so much upon the exercise of a sound discretion that it would be unsafe to lay down any general rule for the disobedience of which an exception should be allowed. See also, *Flynn v. Murphy*, 2 E. D. Smith, 378; *Phil. & T. R. R. Co. v. Stimpson*,

14 Peters, 463, per STORY, J. Truly it is at times, as it was here, a delicate discretion, to be used with sound judgment and great care for the case of the prisoner, lest he be jeopardized with the jury by testimony that may never properly have a place in their consideration. And it may be well often to doubt whether the zeal of counsel does not lead to an expectation of forthcoming connecting testimony, when it does not exist. We are not able to see error in the taking of this message in evidence, under the circumstances shown. The prisoner further claims that it was error in the court that it did not on its own motion strike out this testimony, when it had become apparent that the message was not connected with the prisoner. It might be a sufficient though a technical answer to his claim, that there is no direct exception that raises this point. But we will not rest it there, for the argument of the prisoner is, that the ruling in of the message over his objection, on the assertion of the district attorney, put the duty on the court, of itself, after his failure to connect it with the prisoner, to free the case from the objectionable proof. In putting this argument he mistakes in stating the occurrence at the trial, saying that the district attorney, and by implication the court, promised to strike out the testimony on failure to connect it. This is stronger than the fact. The error-book shows that the district attorney's pledge was, that he would consent that it be stricken out. There being no error in receiving the message at first, as a discretionary direction of the order of proof, that it should be stricken out afterward if not made material, was a right of the prisoner which he might ask for or waive. It was a privilege not to be denied to him, nor the use of it to be forced upon him. It was for him to call upon the court to put the case right before the jury, by striking out the testimony, or by charging them to disregard it. There is doubtless a general duty upon a trial court to see that a prisoner has his rights before it; but when he appears with skillful counsel to aid him, it is not error to suppose that all will be done in his behalf that caution and ingenuity can suggest, and the court is not called upon to watch that no lapse like this takes place. A passive course, that does not refuse a motion or request of the prisoner, is not the committal of error. The party against whom such testimony is introduced is protected against prejudice by his right to call on the court to instruct the jury to disregard it. Where he fails to do this, the court may assume that he does not think it of importance enough to need that

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caution. It is no ground of complaint, in such case, that the court has not volunteered to warn the jury, nor a reason for a new trial on the ground of an oversight. 28 How. Pr., 263. We think that it was the duty of the prisoner, if he deemed the immaterial testimony damaging to him, to call upon the court for affirmative action. What was said in the *People v. Parish*, 4 Den. 153, is not applicable here, for three reasons. *First.* It was *obiter*. *Second.* It does not appear that there was an assertion at the trial that connecting proof would follow. *Third.* At the bar connecting proof suggested was that of a conspiracy; and it is a rule of stringency that there must be proof of a conspiracy before the declarations of a co-conspirator can be taken against one on trial for that offense. Yet that rule has some times been made to yield to the other, that the order of proof is in the discretion of the court. *Comm. v. Boyer*, 3 Wheel. Cr. Cas. 140. Nor is *Furst v. Second Ave. R. R. Co.*, 72 N. Y. 542, on a parallel. There improper evidence had been received, and the defendant had excepted. It was improper to receive it when it was received; and nothing that accompanied the reception of it cured the error or held it in abeyance. The defendant had secured a technical advantage on the trial that might enable him to change an adverse result. The offer of the plaintiff to have the answer stricken out—the court making no ruling upon that offer—put no duty upon the defendant to accept, and abandon his exception or to ask a ruling from the court. It differs from the case in hand, because there the evidence was never properly received, the action objected to was always erroneous and there was no duty upon the defendant to seek the correction of it, or to accept it on the proffer of his adversary.

[Omitting a minor point.]

These are all the allegations of error presented to us by the plaintiff in error. None of them are fatal to the judgment, and it should be affirmed.

Judgment affirmed.

All concur.

HOPE V. PEOPLE.

(83 N. Y. 418.)

Criminal law — robbery — intent — taking keys.

Masked burglars forcibly took from the possession of a cashier the keys of his bank. At the same time they compelled him to divulge the combination of the lock of the vault. They entered with the keys and robbed the bank. The keys were never returned. *Held*, sufficient to warrant a finding of robbery of the keys.

CONVICTION of robbery. The head-note and opinion show the point.

Charles W. Brooke, for plaintiff in error.

Daniel G. Rollins, for defendant in error.

RAPALLO, J. [Omitting other points.] It is further urged on behalf of the prisoner that the offense of robbery was not made out, because the keys were not taken *animo furandi*, or with the intent to deprive the owner of the property or to convert it to the use of the robber, but that they only wanted the temporary use of the keys to enable them to enter the bank and rob the safe. Also that the violence was committed for the sole purpose of extorting from Werckle the combination of the safe, and not for the purpose of obtaining the keys.

Although the intent with which the robbers entered Werckle's room is not controlling, we think the evidence was sufficient to justify the jury in finding, if necessary, that they designed to obtain the keys as well as the combination. It was shown that they took the keys from his table, in his presence, and the evidence was sufficient to warrant a finding that this was done against his will and by putting him in fear of immediate injury to his person, as well as by disabling him from making the resistance which he doubtless would have made to their asportation had he been free, and not in fear. He testified that when they took the keys they had entered his room masked, while he was in bed, and had throttled, suffocated and handcuffed him, and by putting a pistol to his head compelled him to disclose the combination of the lock of the

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bank safe, and put him in such a state of terror as to be incapable of resistance. That they then took the keys from a table in his presence, one of them being the key of the street door of the bank. That having thus possessed themselves of the keys, they carried them off and never returned them, and there is no evidence of any intention to return them, or that the street door key has ever been recovered. This evidence was ample to justify the jury in finding a felonious taking of the keys from Werckle against his will and in his presence, by violence to his person and by putting him in fear of immediate injury to his person, and such a finding establishes the charge of robbery in the first degree. 2 R. S. 677, § 55. The intent with which the property was taken was a question of fact for the jury. It cannot surely be a defense in law that the gang afterward used the keys, or any of them, in the commission of the further crime of despoiling the bank. If a servant should be attacked by robbers on the highway and a key should be taken from his person by force and carried off by his assailants, it could not be tolerated that the fact that they afterward used the key in feloniously entering the house of the servant's master, should be held to constitute a defense to the charge of robbery; nor would the jury be bound to find as matter of fact, that their sole intent in taking the key was to use it for the purpose of entering the house, and then to restore it. If they forcibly took the key, intending to appropriate it, and did appropriate it, the use which they afterward made of it, even if in their minds at the time of the taking, cannot affect the question of their guilt, and it was for the jury to say whether they intended to appropriate the keys to their own use.

It was not important whether the robbers formed the plan of taking the key before they entered the room, or put Werckle in a state of fear, or whether it was an afterthought suggested by seeing them on the table. If they availed themselves of the state of terror in which they had put Werckle, in extorting from him the secret of the combination, to enable them to take the key also, that was sufficient. Should robbers attack a traveller with the intent of robbing him of a sum of money which they supposed he had about him, and put him in fear for that purpose, and while he was in that condition they should find upon him a watch which they did not previously know that he had, and availing themselves of his condition, should take the watch, can it be doubted that they could be

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convicted of robbing him of the watch? The question of the felonious taking of the key was submitted to the jury in the manner most favorable to the prisoner. The court charged, at the request of the prisoner's counsel, that in order to convict, the jury must find that the prisoner took the key with the intent to convert and appropriate it to his own use; that his guilt of the burglary would not justify his conviction of the robbery; that if the jury entertained any doubt as to the intent to take and permanently appropriate the key, they must acquit, and that if it was not feloniously taken, originally, it not being returned would not make out a felonious taking.

[Omitting other points.]

The judgment should be affirmed.

Judgment affirmed.

All concur.

ECKHARDT V. PEOPLE.

(83 N. Y. 462.)

Criminal law — indictment — "pregnant woman" — "woman with child"

In an indictment the phrase "woman with child is equivalent" to "pregnant woman."

CONVICTION of administering medicine to a pregnant woman with intent to produce miscarriage. The opinion states the point.

William F. Knitzing, for plaintiff in error.

Daniel G. Rollins, for defendant in error, cited 1 Bish. Cr. Proc., § 612 (2d ed.); 3 Bank Stat. (6th ed.) 1022; Worcester's and Webster's Dictionaries, under heading "child;" 3 Macanley History of Eng. 133; Tempest, act 1st, scene 2d; Measure for Measure, act 3d, scene 3d; id. act 3d, scene 2d; Merchant of Venice, act 2d, scene 5th; All's Well That Ends Well, act 4th, scene 3d; First Henry the VI, act 5th, scene 4th; Pericles, act 3d, induction; Gen., 38, 25; 1st Sam., 4, 19; 2d Kings, 15, 16; Ecclesiastes, 11, 5; Isaiah, 26, 17; Ex. 21, 22; Hosea, 13, 16; II Kings, 8, 12; Amos, 1, 13; Mat. 1, 18, 22-23; Mark, 13, 17; Luke. 21, 23; Rev. 12, 2.

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RAPALLO, J. This case comes up on writ of error on the judgment record alone, and the sole error assigned is that the indictment is defective.

The statute under which it is framed (3 R. S. 932, § 11, 6th ed.), provides for the punishment of every person who shall administer to any *pregnant woman* any medicine, etc., or shall use or employ any instrument or other means whatever with intent thereby to produce the miscarriage of any such woman. The indictment charges that the prisoner used and employed an instrument upon the body and womb of one Minnie Pape, she being then a woman with child, with intent thereby to produce her miscarriage. The alleged defect consists in describing the patient as a woman then with child, instead of describing her in the words of the statute as a "pregnant woman."

The counsel for the prisoner cites authorities showing that in indictments for statutory offenses, it is in general sufficient to charge or describe the offense in the words of the statute, but these authorities do not establish that it is indispensable to employ the precise words. The indictment must state all the facts constituting the statutory offense so as to bring the accused precisely within the provisions of the statute. *People v. Allen*, 5 Den. 79; *People v. Taylor*, 3 Den. 93. But the pleader need not employ the identical words; he may if he choose use other words which are their equivalent in meaning. Bish. Crim. Proc., vol. 1, 612 (2d ed.).

It cannot be doubted that the words "a woman with child," are in their ordinary sense synonymous with "a pregnant woman." They are a definition of the shorter term. It is conceivable that they might be used in a different sense, and so might the word "pregnant" be employed in such a connection as not to denote pregnancy with child. But certainly in the connection in which the words are used in this indictment they can have no other meaning than that the woman was pregnant with child, and the instrument was used to produce miscarriage. It is scarcely necessary to call in the aid of the statute of jeofails to sustain the judgment.

The judgment should be affirmed.

Judgment affirmed.

All concur.

COWLEY V. PEOPLE.

(83 N. Y. 464.)

Criminal law — statutory construction — neglect of child in asylum — evidence — photographs.

A statute enacted that "whoever, having the care or custody of any child, shall willfully cause or permit the life of it to be endangered, or the health of it to be injured," etc., should be guilty of a misdemeanor. The defendant, indicted under this statute, was secretary of a benevolent incorporated institution, an asylum for children, subject to visitation of the public authorities, but of which he was the authoritative and actual head, director, and provider, and the care and custody of whose inmates was actually in him. *Held*, that he had the care and custody of the child within the meaning of the statute; that he was bound, while he retained it and had the means, to furnish it with suitable necessities, and if he had not the means, to apply to the public authorities for aid, or surrender it to them; and that it was not essential to show any specific act of neglect on any given day, although the indictment charged it, but it was sufficient to prove a repeated series and continuous course of neglect.

Photographs of the child showing its physical condition before and after it was received into the asylum were competent in evidence. (*See note*, p. 474.)

CONVICTION of cruelty to a child. The opinion states the case.

Charles Cowley, for plaintiff in error

Daniel G. Rollins, for defendant in error.

FOLGER, C. J. An act of the legislature was passed in 1876, entitled "An act to prevent and punish wrongs to children." See Laws of 1876, ch. 122, p. 95. It enacts that whoever, having the care or custody of any child, shall willfully cause or permit the life of it to be endangered, or the health of it to be injured; or it to be placed in such a situation that its life may be endangered or its health be likely to be injured, shall be guilty of a misdemeanor. *Id.*, § 4, p. 97.

The plaintiff in error was indicted under this statute. We have to do with but two of the counts in the indictment, the first and the second. The first charges that he willfully neglected to provide a child known as Louis Kulkusky, *alias* Louis Victor, with, and to

give to him, proper, wholesome and sufficient food, clothing and means of cleanliness, and thereby did willfully cause and permit his health to be injured. The second charges that he did willfully neglect to provide the child with, and to give and administer to him, proper and sufficient medicine and medical attendance when the child was sick, diseased and ailing and requiring the same, and did willfully cause and permit his health to be injured. Each of these two counts charge, that the plaintiff in error then had the care and custody of the child. They allege the neglect to have been on a day named. On the trial of the indictment the jury found the plaintiff in error guilty. No question is made by the plaintiff in error but that the willful deprivation of sufficient food, in quality, kind and quantity, and of needed medicine and medical attendance, are within the meaning and intention of the fourth section of the act, as we have given it above.

1. The first question that arises on the points made and argued in this court for the plaintiff in error is, that he does not come within the words of the act, "whoever having the care and custody." It is argued that he did not have the care and custody of the child. It seems that the plaintiff in error was the secretary of a benevolent institution duly incorporated, known by the name of "The Shepherd's Fold." It had a board of trustees. It was subject to the visitation of the Supreme Court and of the State Board of Charities and Corrections. It seems however that the plaintiff in error was in the actual charge of the house and the household in which the child dwelt. He was the head of the household, the provider for it, the authoritative director of all its internal affairs. Nearly every practical act in the management and conduct of it was done by him or was under his guidance. Had he given charge that the child should have other or more food, different or more raiment, more frequent administration of medicines, or medical attendance, they would have followed. What the child had of these, and that he had no more than he did have, was in conformity to his rules and because of his directions. The care of the household and its inmates, the custody of them, centered in him. He was the master there, and others were under him. It is idle to claim that the actual physical care and custody of the child was not in him, as the practical arbiter of the daily routine of the house and the family. True, penal statutes must be construed strictly when against the accused person. The letter of the act may not be extended by implication or equita-

ble construction. But even in penal laws, the intention of the legislature is the best method to construe the law; though truly, that is to be deduced from all the words that it uses. *Heyden's* case, 3 Co. 18, 19, n. B. We think that when the legislature said that whoever, having the care or custody of any child, shall willfully permit the life of such child to be endangered, it meant by these words a sentient being who could will and do of his own good pleasure; and that such a one is not without the close purview of the act, because an officer of a corporation, an artificial entity that cannot will or do, save through sentient beings. It may be conceded that the legal control of the child was in the corporate body, which was the ultimate depository of power and authority over it, and which could, through its board of trustees, supersede the plaintiff in error in the actual control, care and custody of the boy. But we notice that in the first section of the act the legislature has used the word "control" in the alternative with the word care and with the word custody; and in such juxtaposition with other phrases as to convey the idea of a legal power to direct and dispose of without an actual physical care and custody. It has been thought that a corporation aggregate could not be indicted for a misfeasance, for that it could not be liable for a crime of which a corrupt intent, or *malus animus*, was a part. 1 Arch. Cr. Pr. and Pl. 51 (*9), note 1. But in later days it has been held otherwise. *Id.* It has however for years been the law of this State that the officers of a corporation might be indicted for the neglect of a duty resting upon it. *Kane v. People*, 3 Wend. 363. Clearly the plaintiff in error did have the actual immediate physical care and custody of the child. The jury have so found, and they have also found that he did willfully permit the health of the child to be injured. The case of the plaintiff in error, in our judgment, is within the words of the statute, it not being questioned by him that the conduct charged against him is within the meaning of the fourth section.

[Omitting minor considerations.]

4. Another point made in this court arises in this wise: The indictment charges the offense to have been on a specific day, the 26th of December, 1879. The proof was of a continued course of conduct, consisting in the giving to the child food insufficient in quantity and unvaried in kind, and like continuous acts or omissions. There was no one act specifically shown by the proof,

that was proven to have been done on any given day. It is claimed that the fourth section of the statute requires that an act, to make out the offense declared by it, should be done on some one day. Doubtless one might cause the life of a child to be endangered, or its health injured, as are the words of the section by a single act; as by putting him to ride upon a vicious and ungovernable horse, or putting him to tend a dangerous piece of machinery. That could be done on a single day. Doubtless also he might cause the same by a course of conduct made up of successive acts or negligences; as by putting him at menial service in a pest-house and keeping him there, or by continuously exposing him to the rigor of the seasons with a lack of clothing. That might run on for many days. Both the single act and the course of conduct might endanger life or injure health; and if one is within the purview of the statute, why is not the other? Take then the other word of the statute—"permit." It conveys exactly the idea of what is claimed to have been shown by the facts in the case, and what we must, from the verdict, assume was shown to the satisfaction of the jury. There was an allowance, a sufferance, a toleration, an authorization by the plaintiff in error of a routine of diet that the medical witnesses pronounced injurious to the health of children. With the care and custody of the child in his hands, and with the power to change that routine, and with the duty of knowing that it ought to have been changed, he suffered it to go on; he started it and (*per* and *mitto*) he sent it through the course of the days and weeks and months during which the boy was with him. We think that the point is not well taken, that the statute requires that the offense be made out by proof of an act on a given day.

Akin to this point is the other, that the evidence was wholly insufficient legally to warrant the jury, under the circumstances, in rendering any verdict save one of acquittal; and that the court should have directed the jury to acquit. It is true, the indictment does aver as the time a given day, the 26th day of December, A. D. 1879, and it is argued that the evidence should have shown a guilty act or omission on that day, and on that alone, or the offense is not made out. As a general rule, the time laid in an indictment is not material. *People v. Van Santvoord*, 9 Cow. 655; *Jacobs v. Comm.* 5 S. & R. 316. And hence evidence may be given of an offense done on another day. It is also said, that where the offense consists in neglect or non-performance, the allegation of a specific day is good,

and the allegation of divers other days renders the indictment bad only as to those days uncertainly alleged, leaving it effectual as to the day specified. 2 Hawkins P. C., chap. 25, § 79 ; Starkie C. P. 60-61 ; 1 Chit. Cr. Law, 218, 180. These authorities are cited and approved in *People v. Adams*, 17 Wend. 475. And see *Rez v. Dizon*, 10 Mod. 335-338 ; *U. S. v. La Costa*, 2 Mason, 129. The offense in this case does not consist of a single act or a single omission. From its nature it is made up of a continuity of acts or of omissions, neither of which may be enough by itself, but each of which comes in with all the rest to do the harm and make the offense. In such case, an indictment is good that avers the offense on a given day, and the proof sustains the averment, when it shows repeated and continuous acts or neglects connected in operation, the result of all of which is the act or effect reprehended by the law. 1 Bish. Cr. Pro., book II, chap. XVIII, § 248 and note 1 ; 1 Chit. Cr. Law, *225 ; 1 Starkie Cr. Pl. (2d ed.) 57.

We think that this point is not well taken. There was testimony of what was the food given to this boy from day to day ; there was testimony that it was not enough in quantity or variety for the healthy nutrition of a growing child ; there was testimony of the state of body and of mind in which the lad was found after months of feeding thus ; and that that state was a result of that feeding. We express no opinion whether or no this testimony was overborne by other in the case. That was for the triers of fact. It was proper to submit it to them. It seems from the error book, that the motion to direct an acquittal was to some extent put upon the ground that the medical testimony presented an alternative, to wit, that the state of the boy might have come from insufficient food, or from incapability of his system to well assimilate food. True, the medical experts did admit the possibility of the latter ; but yet it was for the jury to say where lay the strength for the probability and the reason for it. Having passed the question of the care and custody of the boy being in the plaintiff in error, and the question whether the statute and the indictment required proof of some act on a given day, then on the conflicting testimony, these were pure questions of fact, whether the boy was suffering to the point of injury to his health for the want of proper food, and whether the lack of food was willfully caused by the plaintiff in error. The court was right in leaving those questions to the jury.

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The learned recorder told the jury that if the plaintiff in error took the child into his care and custody, the law imposed upon him the duty of giving such food, clothing, care and medical attendance, as was reasonably necessary and proper to keep the life of the child from danger and his health from injury ; and that if he intentionally neglected to do it, and life was thereby endangered or health injured, he was guilty under the first two counts of the indictment. It is made a point, that this instruction is erroneous, in that it did not state that there was no duty to give food without the means of procuring food. We do not think that in this case there was need of the addition to the instruction that is insisted upon. There is a difference between a natural duty, or duty imposed by operation of law, and a duty assumed voluntarily, and that may be put off voluntarily. A father, who has the care and custody of a child by law of nature, and whose duty to provide for it is correlative, may perhaps say in excuse of non-performance, when indicted at common law for neglect, that he had not the means to get food for the child or himself. Or a relative, who takes a child bereft of parents, into his care and custody because of the ties of blood, may perhaps, in such case, make the same excuse. In *Hogan's* case, 2 Den. Crim. Cas. 277, it is recognized, that had the charge been the common-law offense of neglecting to provide for a child so as to injure its health, there must have been averment and proof of means of support. But one, who with no natural or legal duty, voluntarily takes, nay seeks for the care and custody of a child, must either do his duty to it in giving it food, or must yield to others, or to the public, the care and the opportunity to feed, or he becomes amenable to this statute, which makes no mention of having means of support, as an ingredient of the offense created. Though he may not have the money wherewithal to buy bread and meat for it, he has the right to seek the charity of the kind-hearted, or if he will not do that, to ask for the public alms that the law of the State provides for all its poor. Having undertaken to care for the life and health of the child, he cannot excuse himself therefrom by the plea that he had not counted the cost, that he made an improvident promise. He must bestir himself to get means. or must give up the care that he is unable to keep as it should be kept, and which he is not bound to keep to the harm of the subject. The case of *Reg. v. Chandler*, Dearsley Crim. Cas. 453, does not conflict with this view. There the indictment was

for the common-law offense, and the allegation was that the prisoner was able and had means to maintain her child, but there was no proof to sustain the allegation. In *Reg. v. Jones*, 1 Q. B. Div. 25, though one of the specific questions put to the jury and found affirmatively, included the having of means by the prisoner, yet the judgment puts no stress upon that fact, nor does the statute, upon which the indictment was based, require it. It has been said by MARTIN, B., and ERLE, J., in *Reg. v. Mabbett*, 5 Cox Crim. Cas. 339, that it is the bounden duty of all persons having children, when they themselves cannot support them, to endeavor to obtain the means of getting them support; and that if they will willfully abstain from going to the Union (i. e. the alms-house), where they have by law a right to support, and the children die, they are criminally responsible. That was a case of a mother indicted for manslaughter of a child by not giving it enough food. Besides there was no pretense in the case in hand, that there was a want of means, or of proper provision in the household. On the contrary, the testimony tended strongly to show that there was in the house the material for giving the child just that which the medical testimony showed he should have had. The instruction, the lack of which is complained of, would have been pointless, because immaterial. The court did not err in the instruction as given. What we have said covers the exception to that part of the charge, in which the learned recorder told the jury that if the plaintiff in error did not have the means to provide what was needed for the child, it was his duty to apply to the proper public authorities for public aid. The institution of which the plaintiff in error was an officer, and which was in great measure set on foot by him, was professedly a benevolent and charitable one. Its avowed purpose was to feed, clothe, and rear the needy, in the main gratuitously. It does not answer a charge, that having assumed to do this, it was not done and was willfully neglected, to say that "the plaintiff was not obliged to resort to mendicancy." He was bound to do that which he undertook to do; and if the charitable means at his disposal failed, it was not mendicancy to go to the ordained public supplies, to eke out his lack. The charge was not, that having taken the boy, that was the duty of the plaintiff in error rather than that health be injured, and that he could not do his duty but thereby; the charge applied to the facts of the case, and took them all in its grasp, and held out the idea, not only

of taking the care and custody, but of holding on to it, rather than when there came inability to do it well, giving it up to the public authorities, or getting from them aid to do it.

[Omitting a minor point.]

7. On the trial, the people offered in evidence pictures taken by the photographic process. One picture was claimed to be that of the boy Louis, before he went into the care of the plaintiff in error. Others were of him about two weeks after he had been taken from the custody of the plaintiff in error and to St. Luke's Hospital. They were offered to show the bodily appearance of the child at the several times of taking the pictures. The first one was proven to be a correct likeness of him, a perfect picture of him when he came to this country. The photographic operator, who took the others, testified that he was a photographer doing that business in New York city; that he took them about the sixth of January, which was about two weeks after Louis was taken to the hospital; that they were exactly correct likenesses of Louis, as he appeared at the time of taking them. The house physician at the hospital testified that the last taken pictures represented the child as he appeared at the hospital, only that from the position in which the pictures were taken they did not show the emaciation as great as it really existed. Another medical witness, who saw and examined the child a while after the last pictures were taken, testified that they were about correct. Another such witness testified that they were correct. It was also in evidence that the boy improved in condition after he was taken into the hospital, so that the fair inference is, that if the pictures were a correct likeness of him when taken, they did not show a worse appearance of him than it was when he left the house of the plaintiff in error.

The plaintiff in error objected to the reception of these pictures in evidence. The objection made was general, and did not state the grounds upon which it rested. We must assume that the ground was either general, that photographic pictures may never be properly received in evidence, or special, that these pictures were not, for some reason peculiar to them, competent evidence. As to the latter, as we have seen, there was evidence that they brought into court a faithful likeness of the boy as he appeared when they were taken; and that though they were taken at a lapse of days after he left the custody of the plaintiff in error, he had in that lapse bettered in physical condition, so that his appear-

ance then was more favorable to the plaintiff in error, than it was on the day on which he was taken to the hospital. Nor were they offered for other purpose than to show the appearance of the subject, as it was presented to one looking upon him ; in other phrase, to show a physical fact, that the eye of any human being, looking upon the boy, could have taken in. So far as the circumstances of the taking of these pictures, and the purpose of them in evidence were concerned, in our judgment they were properly received, if copies of objects taken by that process are ever competent in evidence. And we are now to consider whether they are, under a proper state of facts, and for a proper purpose, competent evidence. We know not of a rule, applicable to all cases, ever having been declared, that they are not competent. Nor do we see, in the nature of things, a reason for a rule that they are never competent. We do not fail to notice, and we may notice judicially, that all civilized communities rely upon photographic pictures for taking and presenting resemblances of persons and animals, of scenery and all natural objects, of buildings and other artificial objects. It is of frequent occurrence, that fugitives from justice are arrested on the identification given by them. "The Rogues' Gallery" is the practical judgment of the executive officers of the law on their efficiency and accuracy. They are signs of the things taken. A portrait or a miniature taken by a skilled artist, and proven to be an accurate likeness, would be received on a question of the identity or the appearance of a person not producible in court. Photographic pictures do not differ in kind of proof from the pictures of a painter. They are the product of natural laws and a scientific process. It is true that in the hands of a bungler, who is not apt in the use of the process, the result may not be satisfactory. Somewhat depends for exact likeness upon the nice adjustment of machinery, upon atmospheric conditions, upon the position of the subject, the intensity of the light, the length of the sitting. It is the skill of the operator that takes care of these, as it is the skill of the artist that makes correct drawing of features, and nice mingling of tints, for the portrait. Most of evidence is but the signs of things. Spoken words and written words are symbols. Once a deaf mute, born so, was presumed in law an idiot (1 Hale, 34); but later days look upon him as not incompetent to be a witness, if he in fact have understanding and knows the nature of an oath. *Ruston's case*, 1 Leach Cr. Cas. 408. He is now taught to give ideas

to his fellow-men by signs, and his deprivation of some of the common faculties of humanity does not exclude him from the witness-box. The signs he makes must be translated by an interpreter skilled and sworn. So the signs of the portrait and the photograph, if authenticated by other testimony, may give truthful representations. When shown by such testimony to be correct resemblances of a person, we see not why they may not be shown to the triers of the facts, not as conclusive, but as aids in determining the matter in issue, still being open, like other proofs of identity or similar matter, to rebuttal or doubt. A witness who speaks to personal appearance or identity, tells, in more or less detail the minutia thereof as taken in by his eye. What he says is a description thereof, by one mode of signs, by words orally uttered. If his testimony be written instead of spoken, and is offered as a deposition, it is a description in another mode of signs, by words written; and the value of that mode, the deposition, depends upon the accuracy with which his words uttered are put into words written. Now if he has before him a portrait or a photograph of the person, and it shows to him a correct copy of that person, if it produce to his view a correct description, which he testifies is a likeness, why may not that be given to the jury, as a description of the person by the witness in another mode of signs? The portrait and the photograph may err, and so may the witness. That is an infirmity to which all human testimony is lamentably liable. But when care is taken to first verify that the process by which the photograph was taken was conducted with skill and under favorable circumstances, and that the result has been a fair resemblance of the object, the picture produced may, in many of the issues for a jury, be an aid to determination. Nor are the cases adverse to these views. In *Cozzens v. Higgins*, 1 Abb. Ct. App. Dec. 453; s. c., 3 Keyes, 206, this court held a photograph competent to show the condition of a cellar floor, caused by the acts of one digging down on premises adjoining. In *Udderzook's* case, 76 Penn. St. 340, one was held competent to show the appearance of a man on a question of identity, on the further question of the identity of a mangled dead body as that of the man. In *Ruloff v. People*, 45 N. Y. 213, this kind of picture was held competent on the question of identity of persons. In *Marcy v. Barnes*, 16 Gray, 162, photographic copies, on an enlarged scale, of writings conceded to be genuine,

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and of writing disputed, were held competent for submission to the jury with the writings themselves, on a question of genuineness of handwriting. In *Hynes v. McDermott*, 82 N. Y. 41; s. c., 37 Am. Rep. 538; this court, in a question of expert evidence by comparison of handwritings, held it incompetent to compare a photographic copy of a writing not produced in court, with a genuine writing before the court, the more so as the accurate resemblance of the photographic copy was not well enough shown.

In our judgment, the learned recorder did not err in taking the photographs into the evidence.

These views take in the questions made on printed points, and the oral argument presented in this court. Some reference is made in the printed brief to the questions raised at General Term. It is not understood that any of them are renewed in this court, save what were formally presented to us at length.

We find no error of law calling for a reversal, and the judgment should be affirmed.

Judgment affirmed.

All concur, except MILLER, J., absent at argument.

NOTE BY THE REPORTER. — See note, 26 Am. Rep. 319. In *Reddin v. Gates*, 52 Iowa, 213, an action of assault and battery, the court admitted a ferrotype, showing the condition of the defendant's back three days after the injury. The court said: "The person who took the picture testified that it was a correct representation of the plaintiff's back at the time it was taken. If it had been possible, it would have been competent for the jury to have examined the back at the time the picture was taken, for the purpose of more readily understanding the other evidence. The ferrotype was therefore admissible."

 CREGIN V. BROOKLYN CROSSTOWN RAILROAD COMPANY.

(83 N. Y. 595.)

Abatement — action by husband for injury to wife — death of plaintiff.

Where a husband sues for a wrongful injury to the person of his wife and dies pending the action, the cause of action for loss of service and for the expenses attending the injury survives to his personal representative, but not so of the loss of her society and its comforts.

ACTION for personal injury. The opinion states the case. The plaintiff had judgment below.

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Winchester Britton, for appellant.

J. Warren Lawton, for respondent.

FINCH, J. This action was originally brought by a husband for a wrongful injury to the person of his wife, whereby he suffered damages in the loss of her services and society, and in the expenses of such care and medical attendance as became necessary. Pending the action, but before trial, the husband died and the action was revived, his administrator being substituted as plaintiff. The question whether the cause of action survived came before us on appeal. 75 N. Y. 192. Its answer involved a construction of the statute relating to suits by and against executors and administrators. 3 R. S. [6th ed.] 732, §§ 1 and 2. We held that it preserved the right of action for tortious injuries affecting pecuniary rights or interests, and by which the estate of the deceased was diminished, excepting, of course, the wrongs referred to in section 2, and particularly named. We determined also that the injury to the wife, for which the intestate sued in his life-time, was such a wrong done to the rights and interests of the husband as would survive to his personal representatives, because it involved a pecuniary loss which diminished his estate; and that such result followed, notwithstanding the fact that the complaint also alleged as an element of damages, in addition to the loss of services, that of the "comfort" of his wife.

Upon the trial the court, in submitting the case to the jury, mingled these two classes of damage—those which involved pecuniary loss and diminished the estate, and those which only affected the personal comfort of the husband. After describing the cause of action which the wife had, the learned judge added, that "the other cause of action is the one before you which belongs to the husband, and which, in a prospective point of view, took in the fact that he was not only entitled to her services, and the comfort of her society, but was deprived of and suffered damages from it." Again, the measure of damages was described as affected by the death of the husband, and the court said: "The question which is before you stopped at his death, what he was deprived of in his life-time, the loss of her services and society, and you are limited to that and his expenses," etc. And finally, after excluding from the consideration of the jury certain elements of special

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damage connected with her keeping a store, the learned judge added: "so that you will confine yourselves to what the husband suffered in respect to nursing, attendance, doctor's bill, the deprivation of ordinary affairs, of regular attendance, services, comfort of his wife's society, what the damage was." At the close of the charge the defendant's counsel excepted to so much of the charge as submitted to the jury the question of damages for the loss of society, and so much of it as related to "comfort" independent of services.

The attention of the court was thus called to the precise question, whether in addition to the right of action for pecuniary damages which diminished the estate, there also survived to the administrator a right to recover damages for the loss to the intestate of the society of his wife, and the comfort of such society.

The conclusion of the court is sought to be sustained upon two grounds. The first is, that the charge, in the respect objected to, did not, in fact, go beyond a claim for services, and that what was intended by the use of the word "comfort" was merely the personal service of the wife as contradistinguished from the service of a stranger or a hired nurse. That is the substantial ground taken by the General Term. We do not think such a construction is just. It is not the natural or apparent import of the language, and could hardly have been so understood by the jury. How the defendant's counsel understood it was made very plain by the precise terms of the exception. Comfort, as independent of services, was the point of his objection, fairly and distinctly stated. It is not to be presumed that if he plainly misunderstood the meaning of the charge the court would have avoided explanation. If the counsel misunderstood it the jury might also, and indeed would be very certain to do so when the interpretation, openly and distinctly put on it by the counsel, was in no manner qualified or repudiated by the court. We must understand therefore the charge to mean, as it plainly did mean, that a right to damages for the loss of the wife's society, and the comforts of that society, survived the death of the intestate and vested in the administrator.

The correctness of that ruling is argued on another ground. It is said that the cause of action which survives must do so as one and entire, and cannot survive in part and abate in part; and our attention is called to the cases of which *Moore v. Hamilton*, 44 N. Y. 666, is a type. It was there said that when the action is revived

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the issue and proceedings are taken up at the point where death, marriage or other devolution of the party, as to whom the change is made, left them; that the new or substituted party takes the place of the former one, and the case is revived and proceeds in all respects as if the new party had been in the case from the beginning. But this was said solely of the proceedings to enforce the right of action and not of the right of action itself. The question to which the opinion was addressed was whether by the revival of an action a subsisting order of reference was vacated. Nothing was said to indicate that such revival carried with it, of necessity, the whole of a prior right of action. We think the elements of damage are easily separable. The intestate, in his life-time, may justly be said to have had one cause of action against the defendant, viz., for damages resulting to him from personal injuries wrongfully done to his wife; but while the cause of an action was in one sense single, his right to damages therefore was compound, and consisted of several and diverse elements. The loss of his wife's services, the expenses necessarily incurred by reason of the injury, were a pecuniary loss, and diminished his estate, and so survived to his administrator; but the loss of his wife's society and the comforts of that society, and the right of action for that, died with him. It cannot be said to have survived to his personal representatives because something else did. That would be to argue that because a cause of action survives in part, and as to some elements of damage suffered, its revival draws with it damages which died with the party. We said in this case upon the question of the right of revival, that where the cause of action is not one of those enumerated in the statute, the character of the damages may control the question whether there is an injury to the property, rights or interests of the plaintiff; that is to say, that where an action is brought for the recovery of damages in the case referred to, wholly and entirely of such a character that they can survive to the personal representatives, the latter may recover them; where they are wholly of such a character that they cannot survive, and die with the party, there can be no revival, and the personal representatives cannot recover; but where a right of action for damages which can survive involves, mingled with it, but separable from it, damages of such a character as die with the party, the revival of the action does not draw the latter with it and permit their recovery.

Wachtel v. Noah Widows and Orphans' Society.

This rule was violated in the submission of the case to the jury, and for that error the judgment should be reversed.

Judgment reversed.

All concur.

WACHTEL V. NOAH WIDOWS AND ORPHANS' SOCIETY.

(84 N. Y. 28.)

Society — expulsion — notice.

The by-laws of a voluntary association provided for striking from the roll members in arrears for dues, after notification and neglect to pay; and for fines for omissions of members to give notice of change of residence. On joining, the plaintiff's intestate gave notice of his residence, but subsequently changed his residence without giving notice. He was struck from the rolls for failure to pay dues, without notice to him. *Held*, that the plaintiff was nevertheless entitled to recover the amount made payable on the intestate's death by the by-laws.

ACTION against a benevolent association for amount payable on the death of plaintiff's intestate, one of its members. The opinion states the facts. The plaintiff had judgment below.

A. J. Dittenhoefer, for appellant.

Ferdinand Kurzman, for respondent.

DANFORTH, J. It is well settled that an association, whose members become entitled to privileges or rights of property therein, cannot exercise its power of expulsion without notice to the person charged, or without giving him an opportunity to be heard. *Ang. & Ames on Corp.*, § 420; *People v. Med. Soc.*, 32 N. Y. 187; *Com. v. Penn. Ben. Ins.*, 2 S. & R. 141; *Jones v. Wylie*, 1 C. & K. 257. This general rule of law is recognized by the defendant's by-law as applicable to one who from any cause should fail to pay his monthly contribution. It is in these words: "The financial secretary shall give to each member who is six months in arrears a written notice, calling his attention to the fact that he shall be stricken from the roll in case he does not pay his dues in thirty days." It is admitted

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that the deceased was in arrears, but it is established as a fact that the notice provided for in such a case was not given to him. It is said however by the learned counsel for the appellant, that this omission was caused by the failure of the deceased to give notice to the association of his change of residence. It does not appear that he was under any obligation to do so. At the time he became a member of the society, he notified it that his then place of residence was 41 First street, in the city of New York, but he subsequently removed to East Eighteenth street. There is nothing to show that the object of the information as to residence was to enable the defendant to serve its notice at that place, or that the deceased agreed that they might be left at his house. There are many other reasons why it would be well for such an association to know the residence of its members ; but however that may be, the defendant, by another by-law, defined the penalty for neglect in giving notice of a change of residence. It declares that for such omission the member in default shall incur a fine of twenty-five cents. It would lead to a most unjust result, if there should be added a forfeiture of the whole benefit to which his representatives are, in case of his death, entitled. Such consequence is not declared and cannot be implied by any legal construction. In the absence of any agreement by the member, or any provision in the charter or by-laws, for a different mode of service, it should be made personally, as required at common law, where the object is to deprive a party of his rights or property ; or if that can be dispensed with, then in such other mode as will be most likely to effect its object. Here there was no service, and the court has found that its omission is not excused. This conclusion is well warranted by the facts found, and the judgment should be affirmed.

Judgment affirmed.

All concur.

WISEMAN v. LUCKSINGER.

(84 N. Y. 31.)

Easement — drainage — license — prescription.

The parties owned adjoining city lots. The defendant had a private plank drain connecting with a public sewer in another street. In consideration of seven dollars he gave plaintiff a writing stating that the money was for

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the right to drain through his premises ; and the plaintiff built a plank drain connecting with the defendant's, and of the same size. After more than twenty years the plaintiff substituted a tile drain of greater capacity, which caused an overflow into defendant's cellar. Defendant then cut the connection and refused the plaintiff access to the premises to open and repair the drain. *Held*, justifiable.

ACTION to restrain interference with the right of drainage across defendant's premises. The opinion states the facts. The plaintiff had judgment below.

D. Pratt, for appellant.

Wm. C. Ruger, for respondents.

DANFORTH, J. Although the action is in equity, the plaintiffs sought compensation in damages as well as equitable relief. The former was denied to them, but the latter has been granted to the full extent asked for. I can discover no ground upon which it can be approved.

The parties are owners of adjoining city lots in the city of Syracuse. The defendant built an underground drain or sewer of plank from the basement of his house, through his own lot and that of one Stern to Jefferson street sewer, and afterward "and more than twenty-five years last past, the plaintiff" as the trial court finds, "purchased of the defendant the right and easement to drain his premises, by an underground drain and covered sewer, through the defendant's premises, for the consideration of seven dollars, which the plaintiff paid and defendant accepted" and thereupon the plaintiff, partly upon his own premises and partly on those of the defendant, built an underground sewer of plank to connect with the sewer of the defendant. The connection was made a short distance from the line dividing the respective lots. It is further found that the "plaintiff for over twenty-five years enjoyed the privilege as of right of draining his own premises through this sewer until July 22, 1876, when the connection was cut off by the defendant on his own land." At that time he denied the plaintiff's right, obstructed the flow of water, "and refused to allow the plaintiff to go upon his premises to maintain and repair the said sewer." It is also found that "before this, and in 1873, the plaintiff caused his old sewer to be taken up and replaced with a

tile sewer of a capacity greater than that of defendant's sewer, with which it was connected." The plaintiff had also made changes in the form of his privy vault, and the court found that "after this change, and the alteration and enlargement of his sewer by the plaintiff, the filth and foul water from his privy flowed back into the cellar of the defendant, creating stench and a great nuisance to defendant, rendering his house unfit to live in, and that to prevent such injury to his premises the defendant tore up said sewer." The learned court also found, as a fact, that "no deed of conveyance of said easement or right to drain through said defendant's premises was ever executed by defendant to plaintiff, nor was any written contract agreeing to convey ever executed by defendant or any one for him, except the receipt for seven dollars for the right to drain through defendant's premises." The receipt referred to was not produced upon the trial, but after proving its loss, the plaintiff was allowed to show its contents by his witnesses. Neither of them had seen the paper for many years, and there was some difference as to its form. It is not stated by the court in any other way than in the above finding, but it is given by one witness in these words: "Received of Joseph Wiseman, seven dollars for the right to drain through my premises;" and this, he says, bore the signature of the defendant. It is adopted by the learned counsel for the respondents in his points, and is the form most favorable to his contention. The trial court found, "as conclusion of law and equity, that the plaintiff acquired the right of draining his premises on the defendant's premises more than twenty-five years before the said obstruction, and during all that time enjoyed the same as of right; that the plaintiff is entitled to judgment declaring his said right and easement on the defendant's premises and restraining him from interfering with the plaintiff's enjoyment of such easement; and that the plaintiff is entitled to go upon the defendant's premises to rebuild and repair the same." Judgment was entered accordingly, and it having been affirmed by the General Term, the defendant has appealed to this court.

The right awarded the plaintiff to have his drain pass through the defendant's land is in the term of the judgment an easement, and for its enjoyment requires that the plaintiff shall have an interest in the defendant's land.

In *Herlins v. Shipham*, 5 B. & C. 221; 11 Eng. C.L. 207, the question was decided in favor of the plaintiff.

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tion was, whether a right to a drain running through the adjoining land could be conferred by parol license, and after the fullest examination it was decided that it could not. The facts in that case are singularly like those now before us, and make the conclusion reached of value upon this inquiry. *Cocker v. Cowper*, 1 C. M. & R. 418, was a similar case. The plaintiff therein sued for the obstruction of a drain which had been originally constructed at his expense on the defendant's land by his consent verbally given. After it had been enjoyed for eighteen years, the defendant obstructed it. It was contended by the plaintiff that the license, having been acted upon, could not be revoked; but the court held that *Hewlins v. Shipman*, *supra*, was decisive to show that such an easement cannot be conferred except by deed. To the same effect are authorities cited by the appellant's counsel. It is therefore within the statute "of fraudulent conveyances and contracts relative to land," and could neither be created, granted nor declared, except by deed or conveyance in writing (2 R. S., tit. 1, chap. VII, part 2, § 6, p. 134); so that consent, although in writing will be of no more avail than it would be if given by word of mouth. Indeed this is conceded by the learned counsel for the plaintiff to be so at law; but he contends that in equity the case is otherwise, and says that "courts of equity give effect to parol agreements for the grant of an easement when founded upon a valuable consideration." Assuming that to be so, we may inquire whether there is anything in this case to call for the exercise of such extraordinary jurisdiction. And first, the contract which equity will regard as equivalent to the grant required at common law or by the statute must be a complete and sufficient contract, founded not only on a valuable consideration, but its terms defined by satisfactory proof, and accompanied by acts of part performance unequivocally referable to the supposed agreement. In such a case the application of the statute is withheld, lest by its interposition the mischief would be encouraged which the legislature intended to prevent. There is, I think, little danger of that in the present case. If we look at the situation of the parties at the time the contract was entered into, it will be difficult to infer that they considered the arrangement indicated by the writing to be a permanent one. The lots of both parties fronted on a public street—in it there was no sewer. If there had been, it cannot be doubted, that as the easiest, cheapest and most natural way of drainage, they would have used it. As it was, the

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defendant was obliged, not only to carry his drain the whole length of his lot, but first by license, and then by purchase, acquire the right to cross another lot before an outlet for his drain could be had. His drain was built of plank, at little expense and soon perishable. While in this condition, the plaintiff applies, according to his own testimony, for the privilege of draining his lot into the defendant's drain, and obtains it by the payment of seven dollars. So much the receipt indicates. There is nothing more. Its language is equivocal. It would be satisfied by drainage during the pleasure of the defendant, or during the life of the plaintiff, or until a public sewer should be constructed in the street by which the lot was bounded. There is nothing said as to how long it should continue. And when we consider the heavy imposition that would rest upon the defendant's lot, the annoyance from smells, the perpetual lien and incumbrance, necessarily rendering the land unsalable or of less value in the market—less available for improvement—compelling the defendant so to build that his structure should not interfere with the plaintiff's right of drainage, of inspection, of rebuilding and reparation, we find nothing which permits the inference that the permission indicated by the receipt was intended to be in perpetuity. The nature and character of the easement, the purpose which it was intended to serve, and other circumstances above adverted to, must be taken into account. The effect of the judgment is to deprive the defendant of the full enjoyment of his property, and subject it to the control of another. I am unable to find, in the words of the parties, any intention to produce that result. It is not expressed in the receipt, nor is it fairly to be implied. Full effect may be given to it by regarding it as a temporary arrangement; and it should, I think, be so construed.

Nor has any thing been done referable to such an agreement as one giving a right in perpetuity. The connecting sewer constructed by the plaintiff was of plank, of short length and trifling expense, temporary and not permanent in character, and as subsequent events have shown, easily and necessarily displaced to make room for another, better adapted to the increasing necessities of the plaintiff and his improved method of removing filth from his premises. The case is not analogous to *Wetmore v. White*, 2 Cai. Cas. 87; *Brown v. Bowen*, 30 N. Y. 541; *Rindge v. Baker*, 57 id. 209; s. c., 15 Am. Rep. 475; *Babcock v. Sutter*, 1 Abb. Dec. 27; *Pierrepoint v. Barnard*, 6 N. Y. 304; *Miller v. A. & S. R. R.*, 6 Hill, 63; or

Wolfe v. Frost, 4 Sandf. Ch. 93, cited by the learned counsel for the respondents. So far as they bear upon the question as to the effect of part performance, it will be seen that large expenditures were made upon permanent and valuable improvements, not reasonably to be accounted for except upon the belief, on the part of the person making them, that an actual interest or estate in the land had been acquired, not depending upon any contingency, or the will or acquiescence of another. This was so in *Wetmore v. White*, *supra*. Mills were erected, for the use of which the easement in question was indispensable. The court say: "Public accommodation and private emolument were probably the primary inducements for building the mills and diverting the water; the same reasons, for any thing that appears, now exist for their continuance." The defendant claimed the right to restore the water to its original channel, but the court denied it, on the ground that his conduct in not disclosing his right at the time of selling the mills, his sleeping so long upon the claim and permitting the appellant to expend his money in repairing and rebuilding the mills, was unconscientious and formed strong grounds for the interposition of a court of equity. *Brown v. Bowen*, *supra*, was an action for damages caused by defendant's acts in setting water back upon the plaintiff's mills, and a verdict for the plaintiff was sustained upon the grounds that the defendants were by their conduct estopped from setting up a right to do the acts complained of. On the other hand, in *Babcock v. Utter*, *supra*, it was held that the easement then in question, and which in character was like the one claimed here, was an interest in real estate, incapable of transmission by parol, and the question was, "whether it could be done by a court of equity, against the positive provisions of the statute." There the license given permitted the doing of an act on the land of the licensor by which water power had been secured. The defendant interfered with it and the plaintiff brought an action in equity to establish his easement, to restrain the defendant from diverting the water, and for damages for the diversion already made. He failed in the action, the court saying: "A mere verbal license to do an act or a series of acts upon the land of the licensor necessarily excludes all idea of a right to do the act or acts by virtue of a contract or promise, which equity might enforce specifically;" adding: "To grant the relief here prayed for would effectually subvert the legal right, or which is the same thing in effect, forever prevent the exercise of

those rights which unavoidably pertain to one seized of the undisputed legal title, and with which he has never consented to part." The consequences thus pointed out are illustrated by the judgment in this case. It gives to the plaintiff a right to the perpetual use of the defendant's land, although "there is no stipulation as to such title or right," and it is therefore as declared in the case cited, "as repugnant to the principles of equity as to the rules of law." I do not in detail state the other cases cited by the appellant, for as to them it is enough to say they decide nothing contrary to the views expressed in the case just referred to. While the argument of the learned Judge WELLES, in *Pierrepoint v. Barnard*, 6 N. Y. 279, distinguishes between an easement and a license, *Miller v. A. & S. R. R. Co.*, 6 Hill, 63, and *Wolfe v. Frost*, 4 Sandf. Ch. 93, seem to support the appellant's view of the proper limitation to the plaintiff's rights. There are no doubt many cases in which courts recognize an equitable right to an easement without a deed; but there will be found in them either an express agreement for an easement, or an acquiescence or consent by conduct which has led to the erecting of permanent works, or valuable and lasting improvements, or some other fact which would make the assertion of a legal title operate as a fraud upon the persons setting up the equitable right. But here there is no agreement for an easement, and no circumstances which render it inequitable in the defendant to insist upon the application of the statute.

The agreement however to be implied from the receipt was undoubtedly good as a license, giving to the plaintiff immunity while acting under its privilege, but no vested right entitling him to its use or enjoyment against the will of the grantor; and this presents the point of difference between the parties. In behalf of the plaintiff is claimed an indefeasible right to an easement, such as passes by deed only; while the defendant denies to him any interest except as licensee, and construes the receipt as a mere dispensation or license, which "properly passes no interest nor alters or transfers property in any thing, but only makes an action lawful, which without it had been unlawful." Per VAUGHAN, C. J., *Thomas v. Norrell*, Vaughan, 351. Therefore the plaintiff had liberty to enter upon the defendant's land and lay his sewer, subject to interruption at the defendant's will, but nothing more; and this except for the license would have been unlawful. The principle upon which, after the fullest consideration, *Babcock v. Utter*, *supra*, and *St. Vin-*

cent Orphan Asylum v. Citg of Troy (hereafter referred to), and *Wood v. Leadbitter*, 13 M. & W. 838, were decided, applies here, and the case itself seems a reproduction of the one put by ALDERSON, J., in the one last cited. "Suppose," he says, "the case of a parol license to come on my lands, and there to make a water-course, to flow on the lands of the licensee. In such a case there is no valid grant of the water-course, and the license remains a mere license, and therefore capable of being revoked. On the other hand, if such a license were granted by deed, then the question would be on the construction of the deed, whether it amounted to a grant of the water-course; and if it did, then the license would be irrevocable." Now the receipt contains a mere license or permission to drain, and no agreement to convey an easement; nor is the license coupled with any interest in the land. It was therefore revocable, and its revocation did not operate as a fraud upon the plaintiff. His expenditures were trifling, and for aught that appears, have been more than repaid in the use already had by the plaintiff of the privilege given to him. There is no finding that by the action of the defendant he will be deprived of the means of drainage; and the contrary may not only be presumed, from the fact that the lot is on one of the public streets of the city, but if we look into the evidence, we see that there are sewers in neighboring streets to which access may be had, although doubtless with more expense and labor. Without regard however to these considerations, which apply to the equity of his case and to any right, we have no doubt of the power of the plaintiff to revoke the permission or license given. Nor does the fact of payment for the license alter the defendant's right. His permission to drain was still a mere license, and none the less revocable that it was paid for. *Hewlings v. Shippam*, 5 B. & C., *ante*.

It is also contended, on behalf of the plaintiff, that the judgment may be sustained upon the ground that he has a prescriptive right to the easement. This claim is inconsistent with the theory of the action, as we find it disclosed in the complaint. There an agreement of purchase is set out, naming the price paid, and the averments of right subsequently made evidently refer to a right so acquired; and following that theory is the finding of the trial judge, based upon an agreement for which a consideration was paid. Moreover it is opposed to the claim that the agreement ex-

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ists of which specific performance may be decreed ; for to support it the possession and part performance must be with consent of the vendor, and in pursuance of and in reliance upon a contract, for otherwise there would be no fraud in the refusal of the vendor to execute or abide by his agreement. So if the possession was adverse ; and in neither aspect would it present a feature for the jurisdiction of a court of equity. But I find nothing upon which this point can stand. The finding of the trial court is distinct : That within a short time after 1842, "and more than twenty-five years last past, the plaintiff purchased of the defendant the right and easement, for the consideration of seven dollars." Thus the acts of possession commenced by permission purchased for a price, the minds of both parties concurring. If we look at the testimony given on the trial, we also find that the plaintiff's theory, from the beginning to the end, was that "an arrangement was made between the plaintiff and the defendant in reference to the sewer." such is the plaintiff's own evidence. He says he applied to the defendant for the privilege and obtained it — that he first obtained this right. He says: "Ho permitted me to get a sewer there at the time I built the house ; I made the bargain with him to connect the sewer," and then did so. The defendant confirms this. Denying the receipt of money admits that he gave permission. As to that fact, there was no controversy between the parties ; and it follows that there could be no adverse possession until after July, 1876, when the defendant did the thing complained of, and cutting off the plaintiff's sewer, forbade his entrance upon the premises. Up to that time, possession under the license or permission of the defendant prevented it from being adverse. But the question is well settled by authority. *White v. Spencer*, 14 N. Y. 247-249 ; *Jackson v. McConnell*, 19 Wend. 177 ; 32 Am. Dec. 439 ; *Jackson v. Parker*, 3 Johns. Cas. 124. *St. Vincent Orphan Asylum v. City of Troy*, 12 Hun, 317, came before the Supreme Court in 1877. It appeared that in 1853, the defendant, by formal resolution of its common council, relinquished certain land theretofore used as a street, and in the same manner declared that the Troy Hospital, which then stood on the adjacent lot, was at liberty to inclose the land so relinquished within its grounds, for the use of that institution. This was done, and possession retained for more than twenty years. But thereafter the city sought to remove the wall, and in an action commenced against them, the plaintiff recovered. Upon appeal the

General Term sustained the verdict, upon the ground that under the resolution of 1853, possession had been taken and permanent improvements made on the faith thereof, and held that the defendant was concluded by its resolution, "followed, as it was, by actual and continued occupation under claim of absolute right, especially in view of the improvements made on the faith of the action of the common council." Upon appeal to this court, 76 N. Y. 108; s. c., 32 Am. Rep. 286, the judgment was reversed. The view taken by the Supreme Court was relied upon in support of the judgment, and it was also urged that the plaintiff's possession was adverse to the title of any other claimant. This court however held, first, that the resolution of the common council was invalid for want of power; but in answer to the plaintiff's claim as one holding by adverse possession, say: "The plaintiff's occupation, at least previous to the rescission by the common council in 1868, was not an adverse possession within the statute of limitations;" adding: "The occupation of a grantee of the fee is perhaps hostile to his grantor, but not so as to a licensee." I am not able to see why this decision is not in point and conclusive upon us in this case. The resolution was general and unlimited in terms; it gave permission "to inclose" the land "for its use." It was held to be a license. It was also held to be invalid. But the court say: "The entry of the plaintiff was nevertheless under it, and the holding is not adverse." In the case before us, the words of the receipt are general and unlimited, "for the right to drain through my premises;" but if construed so as to give an interest in land or an easement, are invalid, because not in conformity to the statute. And the court further say: "The license, being invalid and void, could of course be the foundation of no right in the plaintiff, but its entry and occupation thereunder was nevertheless no more adverse to the defendant than if the license had been valid." The same doctrine is asserted in many other cases, and is deemed so well settled, that it has found its way into the text-books, where, in various forms of words, it is declared that enjoyment had under a license or permission from the owner of the servient tenement confers no right as to the easement (Angell on Water-courses, § 216); and so the effect of the user would be destroyed, if it were shown that it took place by the express permission of the owner of the servient tenement; and the reason is, that such enjoyment is consistent with the right of the

owner of that tenement, and consequently confers no right in opposition thereto. *White v. Spencer, supra*.

The case of *Sibley v. Ellis*, 11 Gray, 417, cited by the respondent, is not in conflict with these propositions. It there appeared that the user began in a trespass and had continued open and adverse for twenty years. It was therefore held that the defendant had a prescriptive right. To the same effect are many other cases cited by him; but they have no tendency to support the demand of the plaintiff. His user has not been adverse, nor has it been under a claim of right. The trial court does not so find it, nor that it was adverse. In the recent case of *Ward v. Warren*, 82 N. Y. 265, and to which our attention is called, the plaintiff claimed the title by prescription; and it was adjudged in his favor, because the trial court found "that the use of the way by him and his predecessors in the title had been adverse, under claim of right, exclusive, open and notorious, with the knowledge and acquiescence of defendants and their grantors, for forty-eight years." It was substantially so in the other cases cited by the respondent. Here there is no finding that the use was under a claim of right, or that it was adverse. On the contrary, the source of the plaintiff's possession was the defendant's permission; never under any claim of right, or in any sense adverse to the defendant. Our attention has been also directed to the following as authorities in favor of the plaintiff's contention. Wash. on Eas., § 88; *La Frombois v. Jackson*, 8 Cow. 589; *Briggs v. Prosser*, 14 Wend. 227. It is said by Washburn, *ante*, that although a right of way cannot be created by parol agreement, yet where, under such an agreement, the way was used for twenty years, and the same was acquiesced in by the owner of the servient estate, a prescriptive right was thereby gained. The learned author, as authority for this statement, cited *Ashley v. Ashley*, 4 Gray, 197. It depends on quite other considerations. It appeared that when a deed of certain land was delivered to the defendant, the grantor's agent stated it reserved no right of way to her own lot, and the defendant replied that she might pass over the land as much as she pleased, "as much as if the right of way was in the deed;" and the user having thereafter continued twenty years, this evidence was admitted, as having a tendency to show that the plaintiff used the way openly, as of right, against the owner of the soil, and so was adverse. *La Frombois v. Jackson, supra*, is to the effect that an

entry under color of title will be adverse, however groundless the supposed title may be, while possession, without claim of title, will never confer a title on the possessor. In *Briggs v. Prosser*, *supra*, the defendant, for the purpose of showing adverse possession, offered to show that he was in under contract for the conveyance of land, the price of which had been fully paid, so that he was in equity the owner, and also to show declarations of the plaintiff to the effect that he had sold the premises to the defendant, and that they belonged to him; and all this for the purpose of establishing an adverse possession. It was held proper for that purpose, because the defendant was equitably entitled to a deed, and there was nothing in the character of the possession under it inconsistent with the idea of an adverse possession. Whether it were adverse or not the court say "would depend upon the circumstances of each particular case." In both cases possession was taken under a contract for a deed, and it was held, and nothing more, that this did not *per se* necessarily preclude the adverse character of the subsequent possession. In the case before us there was no contract for a deed or any engagement to confer a title. The cases are not in point. In all, there was an equitable title and a claim of right; and in each of the last two, an agreement for a deed. In all, an obvious intention to claim the title and a possession inconsistent with the plaintiff's ownership. As I have above undertaken to show the possession of the plaintiff here was under no claim of right, and was entirely consistent with the defendant's title. The plaintiff's enjoyment was permissive, and he had no title, either in law or equity.

It is clear that the defendant, in the acts complained of, has gone no further than to exercise his legal rights. Of these he should not be deprived, unless he has acted in such a way as to make it fraudulent for him to set them up. There is no finding to that effect; nor would the evidence warrant such conclusion. The plaintiff has made out no case against this appeal; and the judgments of the General and Special Terms should therefore be reversed and a new trial granted, with costs to abide the event.

Judgment reversed.

All concur, except EARL, J., dissenting. FINCH, J., concurring in result.

LEONARD V. COLUMBIA STEAM NAVIGATION COMPANY.

(84 N. Y. 48.)

Comity — action for death by negligent injury in another State — evidence.

An administrator appointed in New York may maintain an action for the death of his intestate, occasioned by a negligent injury by the defendant in another State having a statute substantially like the New York statute, allowing an action of damages for death by negligence,* and his letters issued in New York are conclusive of his right to recover.

ACTION of damages for death by negligence. The opinion states the case. The plaintiff had judgment below.

Dennis McMahon, for appellant.

Christopher Fine, for respondent.

MILLER, J. The intestate was killed by reason of the explosion of a boiler of a steamer within the boundaries of the State of Connecticut, which the jury found was occasioned by the negligence of the defendant, who was the owner thereof. The statutes of that State created a cause of action in favor of, and for the benefit of the next of kin and heirs at law, in certain cases which are enumerated. By the Revised Statutes (ed. of 1875), section 3, page 488, a right of action is given to the representatives of a person killed by the negligence of any railroad company or its servants, to recover damages to the amount of \$5,000. The common-law rule as to actions for injuries to the person is changed, and it is provided that an action to recover damages for injury to the person, etc., shall not abate by reason of death, and that the executor or administrator may prosecute the same, and that all actions for injuries to the person, whether the same do or do not instantaneously or otherwise result in death, shall survive to his executor or administrator, etc. Stats. of Conn. (revision of 1875) chap. 6, title 19, §§ 8-9. It is held that under these provisions of the statutes of Connecticut an action lies in that State in favor of the representatives of a deceased party to recover damages. *Murphy v. N. Y. & N. H. R. R. Co.*,

*See *Buckles v. Ellers* (72 Ind. 230), 37 Am. Rep. 156.

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30 Conn. 184; s. c., 29 id. 496; *Soule v. N. Y. & N. H. R. R. Co.*, 24 id. 575. The construction thus placed by the courts of another State upon the statutes of that State should be followed, and is controlling in the tribunals of such State. *Jessup v. Carnegie*, 80 N. Y. 441; s. c. 36 Am. Rep. 643; *Hunt v. Hunt*, 72 N. Y. 218; s. c. 28 Am. Rep. 129.

At common law, personal actions, whether *ex contractu* or *ex delicto*, are transitory (Bouv. L. Dic., Pers. Act.; Trans. Act.); and these actions may be brought anywhere, and are governed by the *lex fori*. Bouvier; Story on Conf. of Laws, § 307, *n. c.* The cause of action which the statutes of Connecticut created is transitory in its nature, and unless excepted from the general rule as to the place where such actions may be brought, can be enforced in the courts of this State or any other forum, provided the laws of that forum do not forbid its maintenance. In this State it is held that actions will lie for injuries to the person, committed outside of the territorial limits of the State. In *Smith v. Bull*, 17 Wend. 323, it was decided that an action for an assault and battery, committed in the State of Pennsylvania, could be maintained in any Court of Common Pleas of this State. The rule, no doubt, is that all common-law actions for an injury in a foreign country are transitory in their character, and may be brought in another State or country besides that in which they originated. In contemplation of law the injury arises anywhere and everywhere. The right to recover in such cases rests upon the presumption that the common law prevails in such other State, and that the injured party could have recovered there had the action been brought in such State. The remedy in such cases is given by the courts of one country or State upon the principle of comity which is due by one sovereign State or country to another under similar circumstances. While these general rules are recognized in numerous decisions in the courts of this State, it is also held that the statutes giving an action for damages resulting from death caused by culpable negligence do not apply where the injury was not committed in this State but in a foreign country, unless it is proved that the laws of that country are of a similar character. *Whitford v. Panama R. R. Co.*, 23 N. Y. 465; *Beach v. Bay State Steamboat Co.*, 30 Barb. 433; *Crowley v. Panama R. R. Co.*, id. 99; *McDonald v. Mallory*, 77 N. Y. 547; s. c., 33 Am. Rep. 664.

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These decisions rest upon the principle that the statutes of this State can have no operation in a foreign country where similar statutes do not exist, and that it is not a legitimate presumption that the statute laws of other States or countries are similar to our laws. In *Whitford v. Panama R. R. Co.*, *supra*, the injury was done in New Grenada. After considering the effect of the statute in a foreign country, DENIO, J., remarks: "whatever liability the defendant incurred by the laws of New Grenada by the act mentioned in the complaint might well be enforced in the courts of this State, * * * but the rule of decision would still be the law of New Grenada, which the court and jury must be made acquainted with by the proof exhibited before them." The doctrine of this case is approved in *McDonald v. Mallory*, *supra*, and it is laid down by RAPALLO, J., that where the wrong is committed in a foreign State or country no action "can be maintained here without proof of the existence of a similar statute in the place where the wrong was committed." The rule here laid down is just and reasonable, and it is not essential that the statute should be precisely the same as that of the State where the action is given by law or where it was brought, but merely requires that it should be of a similar import and character. The statute in this State is certainly of the same nature, and the similarity is such as to authorize the conclusion that it is founded upon the same principle and possesses the same general attributes as the statutes of Connecticut which have been cited. The same remedy was to be accomplished, and an examination of the different provisions evinces an agreement in both the statutes as to their main features, and that they are substantially alike and to the same effect as to the survivorship of the action. In fact, when there are similar statutes instead of the common law, the right to recover damages stands precisely the same as if the common law in both States relating to the subject prevailed.

The doctrine that an action will lie when the common law or the statutes of different States or countries correspond, is sustained by numerous authorities. *Madrazo v. Willes*, 3 B. & Ald. 353; *Melan v. Duke de Fitz-James*, 1 B. & P. 138; *Mostyn v. Fabrigas*, 1 Cowp. 161; 1 Smith Lead. Cas. 963; *Shipp v. McCraw*, 3 Murphy, 463; *Wall v. Hoskins*, 5 Ired. 177; *Stout v. Wood*, 1 Blackf. 71.

We are referred to a number of cases by the learned counsel for the appellant as authority for the position, that the death happen-

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ing in the State of Connecticut, and there not being shown to have been any representative there who had taken out letters of administration, an administrator in New York has no right to bring such an action in the courts. The cases cited are the decisions of other State courts, and a brief reference to them will indicate how far they should be allowed to bear upon the question considered. In *Richardson v. N. Y. C. R. R. Co.*, 98 Mass. 85, the plaintiff brought an action for damages under the statute of New York for the killing of the intestate in New York. There was no statute in Massachusetts of a similar character, and it was held that the action could not be maintained. It will be noticed that the statutes of the different States were not of a similar nature and the common-law rule prevailed in Massachusetts. The case therefore is not analogous. In *Woodward v. Mich. So. & N. I. R. R. Co.*, 10 Ohio St. 121, it was held that an administrator in Ohio could not maintain an action under the statute of Illinois authorizing the personal representative of a person who comes to his death by a wrongful act of another to sue for damages. It was questioned whether the petition went far enough to make out an action under the statute of Illinois, or whether an administrator appointed under the laws of Illinois might not maintain such action. The question now presented is not fully considered, and therefore the decision has no force as a case in point. In *Needham v. G. T. Railway Co.*, 38 Vt. 295, the death occurred in the State of New Hampshire, and there was no law existing, or alleged to exist, which gave the plaintiff a right of action. In *Allen v. Pitts & C. R. R. Co.*, 45 Md. 41, there was no allegation that there was any statute in the State where the death was caused creating a cause of action, and it was held, that in the absence of any proof, there was no presumption in favor of a positive statute law of the State, but it must be presumed that the common law prevailed. The case therefore is not in point. In *Selma R. & D. R. R. Co. v. Lacy*, 43 Ga. 461, the same general state of facts existed and the same rule was recognized. *Marcy v. Marcy*, 32 Conn. 308, does not directly affect the question considered. From this review of the cases, it is manifest that the authorities cited do not sustain the position that this action cannot be maintained in this State under the circumstances existing, and we are of the opinion that the right of the administrator to bring the same is clear and beyond question. The letters of administration granted

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by the surrogate are conclusive as to his authority. *Roderigas v. East River Savings Inst.*, 63 N. Y. 460; s. c., 20 Am. Rep. 555; *Kelly v. West*, 80 N. Y. 139. The letters on their face show that the intestate died "leaving assets" in the State and in the county of New York, and this gave the surrogate of the county of New York jurisdiction. 3 R. S. (6th ed.) 76, § 24. Nor was it essential, we think, that letters should have first been taken out in the State of Connecticut. Be that as it may, however, the letters issued by the surrogate are conclusive as to the right of the administrator to maintain this action.

[Minor point omitted.]

After full consideration, we think that the case was properly disposed of at the Circuit, and that the judgment should be affirmed.

Judgment affirmed.

All concur, except RAPALLO, J., absent, FOLGER, C. J., concurring in result.

ROOT V. WRIGHT.

(84 N. Y. 72.)

Attorney and client — evidence — confidential communications.

The common attorney of two or more parties, adverse in interest, cannot testify in a suit between one of them and a third person, to communications made between them in his presence, before suit, while he was acting as such attorney in respect to the matter in question.*

ACTION of foreclosure. The opinion states the facts. The plaintiff had judgment below.

S. N. Dada, for appellant.

Howe & Rice, for respondent.

ANDREWS, J. The liability of the defendant for the deficiency arising on the sale of the mortgaged premises turned upon the question, whether the deed from Foster was intended as an absolute conveyance, or simply as a mortgage. If it was intended as a security merely, the covenant thereon to assume and pay the plaintiff

* See *Bacon v. Friesee* (80 N. Y. 384), 36 Am. Rep. 627, and note, 631.

iff's mortgage was in effect an agreement between Foster and the defendant that the latter should advance the amount of the prior lien upon the security of the land, and gave no right of action to the plaintiff, who was neither a party to the contract nor the person for whose benefit it was made. *Garnsey v. Rogers*, 47 N. Y. 241; s. c., 7 Am. Rep. 440; *Pardee v. Treat*, 82 N. Y. 385. The referee found that the deed was intended as an absolute conveyance, and to establish this view of the transaction, the plaintiff on the trial called as a witness the attorney who drew the deed, who was permitted, against the objection of the defendant, to testify to the conversation between Crosby, Foster and the defendant Wright, at his office, when the deed was drawn. The evidence of the attorney (who is also the attorney for the plaintiff in this action) was material upon the point in controversy. The general facts are, that on the morning of the day when the deed was drawn, and before the conversation at the attorney's office, Crosby, Foster and Wright had an interview. Foster was the owner of the land embraced in the plaintiff's mortgage, and the mortgagor. Crosby held a junior mortgage on the same premises, which was due. Wright was liable as second indorser of a note upon which Foster was primarily liable, and Foster was also indebted to him for money advanced. Crosby was urging the payment of his mortgage, and at the interview between Crosby, Foster and Wright, it was proposed by Crosby, that Wright should take an assignment of his mortgage, and that Foster should execute to Wright a deed of the land as security for the payment of the sum he should advance to Crosby, and for his liability as indorser. This proposition was finally assented to by Wright and Foster, and the three persons, by mutual agreement, then went to the office of the attorney to consummate the proposed arrangement. The arrangement, as the attorney testifies, was there changed, and his evidence tends to show that it was agreed that Foster should convey to Wright by an absolute and indefeasible deed, and that Crosby, instead of assigning, should satisfy his mortgage upon payment thereof by Wright. The attorney was contradicted on material points by other witnesses, and the question is, whether the evidence of the attorney in respect to the transaction at his office was admissible.

The referee found that Wright, Foster and Crosby, after making the verbal agreement, went to the law office of the attorney for the purpose of employing him professionally to draw the necessary

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papers to carry out that agreement, and that on the agreement being stated to him, it was changed by his advice. The rule that an attorney cannot disclose communications made to him by his clients, is not, as now understood, confined to communications made in contemplation of, or in the progress of an action or judicial proceeding, but extends to communications in reference to all matters which are the proper subject of professional employment. *Williams v. Fitch*, 18 N. Y. 550; *Yates v. Olmsted*, 56 id. 632. The rule prohibiting such disclosure still exists, notwithstanding the change in the law permitting a party to an action to be examined as a witness on his own behalf, or at the instance of the adverse party, and is made a part of the statute law by section 835 of the Code of Civil Procedure. It is not necessary, in this case, to consider the question, whether an attorney, employed as the common attorney of two or more parties to give advice in a matter in which they are mutually interested, can, on a litigation subsequently arising between them, be examined at the instance of one of the parties, as to communications made when he was acting as the attorney for both. See *Whiting v. Barney*, 30 N. Y. 330. However this may be, we are of opinion that he cannot disclose such communication in a controversy between such parties and a third person. Where parties, having diverse or hostile interests or claims which are the subject of controversy, unite in submitting the matter to a common attorney for his advice, they exhibit, in the strongest manner, their confidence in the attorney consulted. The law should encourage, and not discourage, such efforts for an amicable arrangement of differences, and public policy and the interests of justice are subserved by placing such communications under the seal of professional confidence to the extent at least of protecting them against disclosure by the attorney at the instance of third parties. This position, if not directly adjudicated, is supported by the opinions of judges in several cases. *Rice v. Rice*, 14 B. Mon. 417; *Robson v. Kemp*, 4 Esp. 233; *Same v. Same*, 5 id. 52; *Strode v. Seaton*, 2 Ad. & El. 171; see also, opinions of GROVER, J., in *Britton v. Lorenz*, 45 N. Y. 57; INGRAHAM, J., in *Whiting v. Barney*, 30 id. 342; SMITH, J., 38 Barb. 397.

For the error in admitting the evidence referred to, the judgment should be reversed and a new trial granted.

Judgment reversed.

All concur.

BOONE V. CITIZENS' SAVINGS BANK.

(94 N. Y. 88.)

Gift—payment—by savings bank to administrator of deposit or trustee.

Payment by a savings bank to the administrator of a depositor whose account was "in trust for C. B.," upon production of the letters of administration and the pass-book, and in the absence of any notice from the beneficiary, the production of the book by the rule of the bank entitling the bearer to payment, is valid and effectual to discharge the bank. (*See note, p. 501.*)

ACTION for a savings bank deposit made by Susan Boone, "in trust for Christopher Boone." Susan drew one year's interest. The note of the bank was that "presentation of the pass-book shall be sufficient authority to the bank to make any payment to the bearer thereof." Susan died, and her administrator presented his letters and the pass-book, and demanded and received the money. This action was brought by Christopher's administratrix, who had judgment below.

Albert Mathews, for appellant.

Edwin G. Davis, for respondent.

FINCH, J. The case of *Martin v. Funk*, 75 N. Y. 134; a. c., 31 Am. Rep. 446, determined that the deposit, made with the defendant by Susan Boone, constituted her a trustee for Christopher Boone, and transferred the title to the fund from her as an individual to her as a trustee. It further determined that in an action by the beneficiary against the administrator of the trustee and the depository, the *cestui que trust* was entitled to a delivery of the pass-book, which constituted the voucher for the deposit, and to receive the money from the bank. It did not however decide the question presented here, whether a payment by the bank to the administrator, upon the production of his letters, and of the pass-book, and in the absence of any notice from the beneficiary, was a good payment and effectual to discharge the bank.

It may not be doubted, that if the intestate, in her life-time, had

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demand the money of the bank and presented her pass-book, no claim by the beneficiary having been interposed, the bank would have been bound to pay; and this for the reason that such was their express contract. They received the money as bailees, agreeing to pay it on demand to Susan Boone, trustee. What the trust was they neither knew nor were bound to inquire. That was a matter wholly between trustee and *cestui que trust*, at least, until the latter gave notice to the bank of a hostile claim. They had received the money of the trustee, agreeing to return it to her, as trustee, on demand. When she called for it they were bound to pay, and having done so were discharged from all liability. And this was all the more certainly true because of the peculiar provisions of the contract. It was one of the stipulated terms of the deposit, expressly agreed upon at the time, that "the pass-book shall be the voucher of the depositor, and evidence of his property in the institution, and the presentation of the pass-book shall be sufficient authority to the bank to make any payment to the bearer thereof; that the officers of the bank will endeavor to prevent fraud upon its depositors; but all payments to persons producing the pass-books issued by the bank shall be valid payments to discharge the bank." We held, in *Allen v. Williamsburgh Savings Bank*, 69 N. Y. 317, that such a stipulation was lawful, and both parties were bound by its terms. If therefore Susan Boone, trustee, to whose credit the deposit stood, had appeared at the bank, and demanded the fund, producing the pass-book as her voucher, and the bank had paid her the money, it is certain that the payment would have been good, and no liability would remain on the part of the bank to any after-claim of the *cestui que trust*. The payment would have been made to the right party — to the person lawfully entitled.

But Susan Boone died before withdrawing the money. If now her right to demand and receive the deposit devolved upon her administrator, no change came over the right and duty of the bank, as it respected a payment to him. All the right of the deceased to demand and receive the money would pass to him, and such payment by the bank to him would be as effectual a discharge as if paid to the intestate in her life-time.

We are of opinion that upon the death of Susan Boone, her rights, as trustee, devolved upon her administrator. *Banks v. Ex'rs of Wilkes*, 3 Sandf. Ch. 99; *Bucklin v. Bucklin*, 1 Abb. Ct. App. 242; *Bunn v. Vaughan*, id. 253; *Emerson v. Bleakley*, 2 id. 22; *Treco-*

thick v. Austin, 4 Mason, 16, 29. He took the property, which, although money, was a distinct and separate fund, and not mixed with the money of the estate, as trustee, not as assets, and held it with all the rights and subject to all the duties of the deceased trustee whom he succeeded. When therefore he appeared at the bank and produced his letters of administration, and the pass-book, which, by the contract, was evidence of his right to withdraw the deposit and demanded its payment, the bank had no alternative. It had no right to inquire into the character of the trust, and owed no duty to the beneficiary, until the latter, by notice, or forbidding payment, or demanding it for himself, created, on the part of the bank, such right and duty. Until then the character of the trust did not concern the bank. Whatever it was in fact, was immaterial, and could not affect the right and duty of the bank to pay the person to whom it owed the debt.

It is true that payment to the person presenting the pass-book is not always and absolutely a discharge to the bank. If paid to one who is neither the depositor, nor in case of death, the legal representative of the depositor, the bank, if it has agreed to use its best endeavors to prevent fraud, must exercise diligence, and is put on inquiry by circumstances of suspicion. *Allen v. Williamsburgh Sav. Bank*, *supra*. But that rule only applies to prevent payment to the wrong person; to one not entitled to receive the deposit. If the right person applies, and payment is made to him, the question of diligence or negligence cannot arise, for nothing has occurred to call it into play.

Nor does it alter the situation to call this an executed trust, and insist upon the right of the beneficiary to have the pass-book, and the fund. If he has such right it reaches the bank through the trustee, and the bank can only pay the beneficiary at the peril of establishing the latter's right as against the trustee to the possession of the fund. It may take that risk, if it chooses, but it is not bound to take it. It may be compelled by the action of the *cestui que trust* to hold the fund as against the trustee, and pay the money into court to await an adjustment of their respective rights, but in the absence of any claim or interference of the beneficiary, it can recognize no one but the depositor or his representative, having possession of the pass-book as the agreed voucher, and evidence of title and payment to him is good. What else remains is wholly a question between trustee and *cestui que trust*.

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The recovery therefore in this case cannot be sustained, and the judgment should be reversed with costs.

Judgment reversed.

All concur, except RAPALLO, J., absent.

NOTE BY THE REPORTER.—See *Young v. Young*, 80 N. Y. 422; s. c., 36 Am. Rep. 684. In *Smith v. Spear*, New Jersey Court of Errors and Appeals, 43 N. J., Rachel Spear, a depositor in a savings bank, in 1874, ordered the following entry to be made in her account: "Frank B. Smith, hatter, Danbury, Conn., son of Joseph Smith and Cornelia; to be drawn by Rachel, after death, by Frank." In 1870, she directed the following entry to be made in her pass-book in another savings bank: "This account is in trust for Frank B. Smith," and signed it with her name. She kept both pass-books in her own possession, and drew the dividends and part of the deposits down to 1878, when she became insane. By the rules no money could be drawn without producing the pass-books. Complainant is her nephew, and understood that although the funds were deposited in trust for him, he was to have no part thereof until Rachel's death. *Held*, that he had no claim to be protected during Rachel's life-time, against her or her guardian drawing the funds.

 FRANK V. CHEMICAL NATIONAL BANK.

(84 N. Y. 209.)

Bank — payment for forged paper — laches of depositor.

The plaintiffs' confidential clerk forged their checks and obtained payment on them from the defendant, their bank. The forged checks were returned by the bank to the plaintiff, with their pass-book, when their account was balanced, but the clerk in assisting them to examine the account fraudulently prevented the discovery of the forgeries. *Held* that the plaintiffs were not estopped from disputing the account and recovering the balance deducting the forged checks.*

ACTION for bank deposit. The opinion states the facts. The plaintiffs had judgment below.

Charles Jones, for appellant.

B. F. Watson, for respondents.

ANDREWS, J. The plaintiffs' firm were depositors with the defendant, and between the 13th of July, 1869, and the 26th of September, 1870, their deposits, together with the balance to their credit at the former date, amounted to \$335,597.67, and during the

* To same effect, *Hardy v. Chesapeake Bank* (51 Md. 522), 34 Am. Rep. 325.

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same period the defendant paid out upon their checks \$323,914.01. The defendant has since paid the plaintiffs \$3,502.08, leaving a balance of \$8,181.58 remaining due from the defendant, unless the plaintiffs are chargeable with thirty-seven forged checks, purporting to have been drawn by them at various dates between July 13, 1869, and September 26, 1870, paid by the bank and charged to their account, amounting in the aggregate to that sum.

The plaintiffs were merchants doing business in the city of New York, under the name of Frank & Hirsch, and the evidence tends to show that the forgeries were committed by one Goodheim, their book-keeper. The firm kept a check book, in the margin of which all checks drawn by the firm were entered. The checks were filled up by Goodheim, but in all cases genuine checks were signed by one of the plaintiffs. Goodheim had charge of the bank account. The plaintiffs had a pass-book, in which the bank entered the deposits, and every quarter-day, or soon thereafter, the pass-book was delivered by the plaintiffs to the bank, for the purpose of having their checks entered therein and a balance struck. This was done on four occasions subsequent to July 13, 1869, and the bank on each occasion entered separately in the pass-book the amount of each check paid, including the forged checks, and struck a balance, and then returned the pass-book with the vouchers to the plaintiffs. But in all this matter Goodheim acted for the plaintiffs. He delivered the book to the bank and received it again after it was written up, with the vouchers. The plaintiffs, on each occasion after the pass-book had been written up and the vouchers returned, made an examination of the account, by comparing the checks returned to them by Goodheim with the memorandum of checks in the margin of the check-book, and the balance in the pass-book, with the balance appearing in the check-book, and on each occasion they were found to correspond. The plaintiff Frank then compared the checks with the entries in the pass-book, by having Goodheim read the entries while he had the checks, and no discrepancy appearing, the account was deemed to be correct and was not further examined. It very clearly appears that Goodheim, by abstraction of the forged vouchers and by false balances and readings, deceived the plaintiffs and prevented them from ascertaining, by means of the examination as conducted by them, the true state of the account and the fact of the forgeries. Goodheim absconded in September, 1870, and soon afterward the plaintiffs discovered three of the forged

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checks among the checks then in possession of the bank. This led to further examination and the discovery of the other forgeries. Thirty-four of the checks charged in the account of the bank, claimed to be forged, which had been returned by the bank, were not found or produced on the trial. The inference from the evidence is that they had been carried away or destroyed by Goodheim.

The recovery by the plaintiffs is sustained by the decision in *Weisser's Adm'rs v. Denison*, 10 N. Y. 68. It is unnecessary to restate at length the grounds of that decision, which are fully set forth in the opinion delivered in that case. The principle that a bank cannot pay out the money of a depositor on forged checks and debit them to his account is clear enough. It is equally clear that it makes no difference that the forgery was committed by a confidential clerk of the depositor, who by his position had unusual facilities for perpetrating the fraud and imposing the forged paper upon the bank. It is however strenuously contended by the learned counsel for the defendant that where, as in this case, a pass-book is kept, which is balanced from time to time and returned to the depositor with the vouchers for the charges made by the bank, including forged checks, the latter is under a duty to the bank to examine the account and vouchers, with a view to ascertain whether the account is correct. It does not seem to be unreasonable, in view of the course of business and the custom of banks to surrender its vouchers on the periodical writing up of the accounts of depositors, to exact from the latter some attention to the account when it is made up, or to hold that the negligent omission of all examination may, when injury has resulted to the bank, which it would not have suffered if such examination had been made and the bank had received timely notice of objections, preclude the depositor from afterward questioning its correctness. But where forged checks have been paid and charged in the account and returned to the depositor, he is under no duty to the bank so to conduct the examination that will necessarily lead to the discovery of the fraud. If he examines the vouchers personally and is himself deceived by the skillful character of the forgery, his omission to discover it will not shift upon him the loss which in the first instance is the loss of the bank. Banks are bound to know the signatures of their customers, and they pay checks purporting to be drawn by them at their peril. If the bank pays forged checks, it commits the first fault. It cannot visit the con-

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sequences upon the innocent depositor, who after the fact is also deceived by the simulated paper. So if the depositor, in the ordinary course of business, commits the examination of the bank account and vouchers to clerks or agents, and they fail to discover checks which are forged, the duty of the depositor to the bank is discharged, although the principal, if he had made the examination personally, would have detected them. The alleged duty, at most, only requires the depositor to use ordinary care; and if this is exercised, whether by himself or his agents, the bank cannot justly complain, although the forgeries are not discovered until it is too late to retrieve its position or make reclamation from the forger. In this case Goodheim was the criminal. His position enabled him to deceive the plaintiffs as well as the bank, and to postpone the detection of his frauds. The plaintiffs seem to have taken unusual care in the examination of the bank account. It was only because Goodheim was the criminal that the examination did not disclose to them the forgeries. He was not the plaintiffs' agent in issuing the forged paper, nor was he their agent in abstracting the false vouchers and falsifying the books, which was done in aid of his criminal purpose. The plaintiffs did nothing to deceive the defendant, nor so far as appears, did they omit to do any thing which ordinary prudence required. The bank, in paying the successive checks, did not act upon the fact that a previous forged check has passed the plaintiffs' scrutiny unchallenged. In each case the bank paid the check presented because upon inspection it supposed it to be genuine. If the forged checks first returned had been immediately ascertained to be forgeries, it might and probably would have prevented the subsequent forgeries. But the failure to detect them was not the reason of the subsequent payments by the bank. We are of opinion that upon the facts found there is no estoppel. The loss must fall upon one of the parties, and it must, we think, be borne by the bank.

There are some exceptions to evidence. So far as they were considered in the opinion below, they are satisfactorily answered. We find none which would justify a reversal of the judgment.

The judgment should be affirmed.

Judgment affirmed.

All concur.

TRUSTEES, ETC., v. KIRK.

(84 N. Y. 215.)

Boundary — cliff — accretion — adverse possession — inclosure.

Town trustees in 1736, having title to lands on a bay, bounded by ordinary high-water mark made an allotment, bounding westerly by a cliff, between which and high-water mark was a strip of land. The defendants and their predecessors, claiming under the allotment, had fenced across this strip to or near low-water mark, removing the fences in winter to prevent their destruction by the ice and tides, but not fencing along the cliff. They had also gathered sea-weed from the strip. In an action to recover this strip, *held*, (1) that the site of the cliff at the time of the allotment was the permanent boundary, and that the plaintiffs could not follow to the cliff, if it had become worn away by the action of the water, in order to make up for the advance of the sea; (2) that there was no necessity of fencing along the cliff, to constitute a "substantial inclosure" within the statute of adverse possession; (3) that adverse possession was not lost by the temporary removal of the fences; (4) that the gathering of sea weed was some evidence of adverse possession.*

ACTION to recover land. The opinion states the facts. The defendants had judgment below.

J. Lawrence Smith, for appellants.

E. A. Carpenter, for respondent.

ANDREWS, J. In the allotment by the trustees of the freeholder and commonalty of the town of East Hampton of the common lands of the town, made in 1736, the Mulford tract, now owned by the defendant, was described as bounded westerly by the cliff. It is assumed by both parties that the title of the freeholders under the Dongan patent extended to ordinary high-water mark. When the allotment was made there was a strip of land between the cliff and high-water mark several rods in width. This strip was not embraced in the allotment, and was consequently reserved by the freeholders as a part of the common lands. The plaintiffs, as owners, held it subject to the incidents which attend the title of riparian

*See *Eddy v. St. Mars*, post.

owners. They would be entitled to whatever should be gained from the sea by alluvion or dereliction, and their title was liable to be lost by the advance of high-water mark, so as to bring the strip reserved within the ebb and flow of the tide. 2 Bl. Com. 262; *In re Hull and Selby Ry.*, 5 Mees. & Wels. 327. There was the possibility of gain or loss, to which all riparian owners are subject.

The defendant introduced evidence tending to show that since the allotment the cliff had been worn away by the action of the sea, and that the space between the cliff as it now exists and present high-water mark was, at the time of the allotment, within the boundaries of the allotted land. If this fact is established, it necessarily follows that the strip reserved by the freeholders from the allotment has been swallowed up by the sea, and the plaintiffs have no title to the *locus in quo*, unless, as they claim, their boundary was carried eastward *pari passu* with the advance of the sea. It is insisted, in support of this position, that the cliff, under the description in the allotment, was a movable boundary. There may be a movable freehold, as when the crown grants to a subject the soil between high and low-water mark. In that case the grant would be construed according to the presumed intention to convey the shore, wherever, from time to time, it might be; and the same construction has been put upon a grant by a subject in whom the title to the shore was vested. *Scrutton v. Brown*, 4 B. & C. 485. So also where an easement is granted to take sea-weed from the beach of the grantor, the right would be held ordinarily to follow the shifting of the beach, occasioned by the imperceptible encroachment or reliction of the sea. *Phillips v. Rhodes*, 7 Metc. 322. But the allotted lands were not bounded by the shore, but by the cliff. The cliff was a visible monument; and there is nothing in the attending circumstances to show that the parties to the allotment apprehended that the shore line would be materially changed. The freeholders may have intended, by bounding the allotted lands by the cliff, to secure to the public in perpetuity the right of access to the sea, but there is nothing to indicate that this was intended to be accomplished in any other way than by reserving from the grant the strip then lying between the cliff and the shore. It would, we think, be an unwarrantable interpretation of the transaction to hold that the cliff mentioned in the allotment was a shifting boundary, so as to entitle the plaintiffs to make reprisal for the land lost by the advance of the

sea out of the allotted lands. The owners of the lands could gain nothing by accretion. They might lose by the advance of the shore line beyond the point where the cliff was originally located. But as between them and the grantor, the site of the cliff at the time of the allotment continued, we think, to be the westerly boundary of their lands. The trial judge charged substantially in accordance with this view, and the exception to the charge upon this point is not tenable.

It was a controverted question whether the shore line had materially changed since the allotment; and upon this point much evidence was given by both parties. If it had not changed, then the plaintiffs made out a record title to the strip in controversy and were entitled to recover, unless the defendant established a title by adverse possession. The most important question now presented upon the point of adverse possession arises upon the plaintiffs' exception to the submission by the court to the jury of the question whether there had been a substantial inclosure of the premises by the defendant or his grantors, for more than twenty years prior to the commencement of the action. It appeared that fences on the lateral boundaries of the defendant's premises, extending across the strip in question into the water to or near low-water mark, had been maintained by the defendant and his grantors for much longer than twenty years. The fences across the beach however were taken away in the winter, to prevent them from being carried away by the ice and tides. The posts, as may be inferred from the evidence, were left standing, and in the spring the fences were replaced and remained until taken away again in the fall. There were bars in the fence. There was no fence in front of the cliff, but that side of the defendant's land was open to the sea. The cliff to some extent operated as a barrier on that side for the protection of the defendant's land. One of the alternative requirements of the statute to constitute an adverse possession is that the land of which title by adverse possession is claimed shall have been protected by a substantial inclosure. Code, §§ 82, 83. In *Jackson v. Schoonmaker*, 2 Johns. 229, it was held that a possession fence, which was made by trees felled and lapping one upon another, did not constitute a sufficient adverse possession to toll the right of entry of the true owner. The court said there must be a real and substantial inclosure, an actual occupancy, a *possessio pedis*, which is definite, positive and notorious to consti-

tute an adverse possession, when that is the only defense, and is to countervail a legal title. The object of the statute defining the acts essential to constitute an adverse possession is, that the real owner may, by unequivocal acts of the disseizor, have notice of the hostile claim and be thereby called upon to assert his legal title. In this case there was no actual inclosure by fences of the land in question. But this is not indispensable in every case. In *Jackson v. Halstead*, 5 Cow. 216, title to land fronting on the Delaware river was claimed by adverse possession. Fences had been erected, extending to a point about a rod from the river, leaving some of the disputed ground uninclosed. But it was proved that the fence at this place was as near the river as the wash of the floods and the make of the ground would permit. This was held to be a sufficient inclosure. WOODWORTH, J., said that it would be too strict to require the fence to be placed on the very margin of the river, where it would be liable to be swept away by the rise of water, and not within the reason of the rule defining what shall constitute an adverse possession. The learned judge further said that a river or mountain, or a ledge of rocks, on one side, forming a natural barrier, the other sides being inclosed, would, with claim of title, constitute an adverse possession. See also *Becker v. Van Valkenburgh*, 29 Barb. 319.

The requirement that the premises shall be protected by a substantial inclosure, if construed to require a continuous, uninterrupted inclosure of twenty years, would in many cases make it impossible to acquire title by adverse possession founded upon that provision. Upon such a construction, if fences were carried away by floods or destroyed by fire, or taken down in the winter for the accommodation of travel, the adverse possession would cease, although they were restored as soon as circumstances permitted. It is well understood that the bottom lands on some parts of the Mohawk river are annually overflowed, and fences are removed to prevent them from being carried away by the flood. It cannot, we think, be claimed that the temporary removal of fences for this purpose defeats an adverse possession, under the provision of the statute in respect to inclosure. In this case the land was left uninclosed on the side toward the sea. The sea was a natural barrier, as much so as a mountain or a river or a ledge of rocks; and the sea, with the lateral fences when maintained, constituted, we think, a substantial inclosure, within the meaning of the statute. The removal of the

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fences during the winter was to protect them from being swept away by the ice and tides. If they had not been removed, but had been left to be carried away each winter by the sea, the defendant could, we think, have replaced them in the spring, and would not have lost his right under the statute. By the voluntary removal of fences he simply anticipated the action of the elements; and having restored them when the danger was passed, and maintained them during the season when the use of the beach for taking sea-weed was practicable, the purpose of notice, upon which the statute proceeds, was met. The statute is declaratory of the previous law as established in this State, and the prior decisions are proper guides to its interpretation. For these reasons we are of opinion that the court properly submitted to the jury the question whether there was a substantial inclosure of the disputed premises by the defendant and his grantors.

The court properly refused to charge that no act of taking sea-weed from the premises by the defendant or his grantors was evidence of adverse possession. It was evidence in connection with the other facts, one of which was that they claimed to prevent other freeholders of East Hampton from taking, and took it not as commoners, but under claim of exclusive right as owners, which claim was known to the plaintiffs. Nor were the plaintiffs entitled to have the jury charged that Rogers, a former owner of defendant's premises, relinquished his adverse possession when he made the agreement with the town to discontinue the suit for trespass, commenced by him in 1853, against one who had gathered sea-weed upon the beach in question, and not to sue again. The act of Rogers in discontinuing the suit and making the agreement stated was, at most, evidence bearing upon the question of adverse possession, for the consideration of the jury.

We think no error was committed on the trial which is presented by any exception in the case, and that the judgment should therefore be affirmed.

Judgment affirmed.

All concur.

MASTERSON V. NEW YORK CENTRAL, ETC., RAILROAD COMPANY.

(84 N. Y. 247.)

Negligence — of several — imputable, of plaintiff's carrier.

The plaintiff's testator, riding by invitation of a stranger in a wagon on a highway, was thrown off and killed by the sudden sinking of the wheels into a depression negligently allowed to exist between the rails of a steam railroad crossing the highway. It was the statutory duty of the steam railroad company to keep the highway safe at that point. A street railway on the highway crossed the steam railway at the same point. It was the statutory duty of the street railway company to keep the highway safe between its rails. *Held* (1), that the duty of repair at the point in question was on the steam railroad company; * (2) that the plaintiff was not debarred from recovering from the steam railroad company, although the driver's negligence was the proximate cause of the accident, provided the driver was sober, competent, and not acting willfully, and there was no apparent reason why the deceased should not ride with him. (*See note p. 514*)

ACTION of damages for death of plaintiff's testator by negligence. The head-note and opinion show the facts. The plaintiff had judgment below.

Hamilton Harris, for appellant.

E. Countryman, for respondent.

DANFORTH, J. As to the general principles of law applicable to this case there is no room for argument. It was the defendant's duty to keep its road-bed at the street-crossing in such condition that a traveller could pass over it in safety, or failing in this, make compensation to a person injured by reason of its omission, unless he was so deficient in reasonable and ordinary care that he brought the accident upon himself. Laws of 1850, ch. 140, § 28, sub. 5: *Cott v. Lewiston R. R. Co.*, 36 N. Y. 214; *Gale v. N. Y. C. & H. A. R. R. Co.*, 76 id. 594. That the plaintiff's intestate was lawfully upon this crossing and there came to his death is not denied. That he was shaken from the wagon, as its wheels passed into a hole within the defendant's tracks, was well proven, and the trial judge,

* To same effect, *Eyler v. County Com'rs of Allegany Co.* (40 Md. 377), 33 Am. Rep. 382.

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in language to which there was no exception, instructed the jury that the plaintiff could not recover unless he established, to their satisfaction, first, that the death was occasioned by the wrongful act of the defendant, either by some omission to do an act required of it, or by some positive wrongful act; and second, that there was no negligence on the part of the deceased contributing to the injury. There was evidence upon both propositions.

[Omitting discussion of evidence of defendant's negligence.]

The learned counsel for the appellant also asserted as ground of nonsuit, that "this injury was not caused by any negligence of the defendant, but if there was any negligence in regard to these tracks, it was the negligence of the Albany & Watervliet Horse Railroad Company." This company was charged with the duty of keeping the street between the rails of its track in repair, and its tracks crossed those of defendant at the point where the accident occurred. In view of the circumstances to which I have already adverted, it is clear that this could not be maintained as matter of law. The statute imposed upon the defendant a duty in regard to the street, its performance was assumed, and there was at least an apparent violation of it. There was, I think, no error in denying the motion for a nonsuit.

Were the jury misinformed or left in ignorance as to the law? The defendant's counsel asked the court to charge that "if the driver's negligence was the proximate cause of the jar which caused the injury, the plaintiff cannot recover." The trial judge replied: "I will not alter my charge in that respect. I did substantially cover that ground." The learned counsel repeated the request, and the court again declined to alter its charge. In each case there was an exception. The testator was a mason, employed on the day in question at North Albany. One Atfield was with his wagon drawing bricks to the same place, and at the close of the day allowed the testator and two others to ride with him to Albany. In its charge the court had called attention to these facts; the conduct of Atfield, the defendant's claim that Atfield was negligent, and said: "It is not claimed that between Atfield and the deceased the relation of master and servant or principal and agent existed; he was invited to ride, and I feel bound to say that the facts do not show a condition of things that would warrant the jury in saying that the plaintiff cannot recover, even if they should find Atfield was negligent; they were not engaged in any joint employment; and what-

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ever doubts may have existed as to what the law was, years ago, it seems now to be settled, that in a case of this character, assuming that Atfield was a competent driver and sober man, and no reason which deceased could discover why he should refuse to ride with him, I do not think, that although there might have been carelessness on the part of Atfield in driving, that would defeat a recovery, unless you should consider there was a willful act upon the part of the driver and the death was caused by his wrongful and willful act." The argument of the learned counsel for the appellant was thorough and earnest, but in support of the exception we find no authority. The charge in this respect was sufficient and within the decisions of this court, substantially in the language used by MILLER, J., in *Dyer v. Erie Railway Co.*, 71 N. Y. 228, and within the principle of that case and that of *Robinson v. N. Y. C. & H. R. R. Co.*, 66 id. 11; s. c., 23 Am. Rep. 1. The request was properly denied. If, under any circumstances, it could be regarded as embracing a rule of law, they do not exist here. The negligence of the driver consisted, it is said, in passing the track at one point rather than another. It may be that if he had chosen some other, the accident would not have happened. But the omission to do so does not make his act the proximate cause of the jar in any such sense as excludes the defendant's negligence from being also a proximate cause. It must be conceded that if he had driven elsewhere there would have been no jar from that obstruction; but also it must be seen that if the obstruction had not existed there would have been no jar. The cases *Cosgrove v. N. Y. C. & H. R. R. Co.*, 13 Hun, 329; *Barringer v. N. Y. C. & H. R. R. Co.*, 18 id. 398, lend no support to his contention. There the defendant was not in fault and had omitted no duty. The accident occurred because Barringer could not control his horse; and both cases are put upon the ground that the defendant's negligence did not cause or contribute to the injury. If the request had been so qualified, a different question would have been presented. The learned counsel for the defendant asked the court to charge that "if the defect in the horse railroad tracks and planking caused the injury, the plaintiff cannot recover," and the court said: "Yes, if it is a defect in the horse railroad that these parties are in no way responsible for." There was an exception; but it needs no discussion, for if a defect existed, and for it the defendant was responsible, they would be liable for any injury arising therefrom. The request was then

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made for a charge "that the defendant is not responsible at all for the horse railroad," and the court said: "Not for the condition of its rails, perhaps, but I decline to charge so; it might be held responsible for any defect in the crossing which was between the rails of the defendant's road. What I charge is that, no matter what may be the measure of care or the responsibility of the horse railroad, still the defendant, having its tracks there at this crossing, must keep the crossing between the rails in such a way as not unnecessarily to impair or render dangerous crossing over these tracks, although it may be the crossing over the track of both the horse railroad and steam railroad at the same place." To this the defendant's counsel excepted. There was, I think, no foundation in the evidence for such a request. It is clear that the accident occurred at the crossing, upon land occupied by the defendant and between its tracks. The duty of maintaining it in proper condition was a corporate duty, in no way limited or restricted by privileges granted to or obtained by others.

The city had a duty to perform. The street railroad also. An action might perhaps lie against either for the omission of duty leading to the death of the testator, but because this crossing had many guardians, the obligation upon the defendant was in no particular diminished. Whatever rights have been granted by statute or by ordinance to others, the duty of the defendant is paramount, and it owes obedience to the statute by which it came into existence. The evidence shows no act done by the street railroad. The planks at the crossing were placed and replaced by the defendant. The crossing was seen to by it after such manner as it chose, but in whatever manner, without interference from the street railway or regard to it. We find also in the statute introduced in evidence by the defendant (Laws of 1863, chap. 223, § 3) relating to that railway, a clause declaring that such company shall not "cross or run over the track of the New York Central Railroad Company, unless on terms to be agreed upon between the two companies," or "in case of disagreement between them," by the Supreme Court. We are not to suppose in the absence of proof that due provision has not been made for the protection of the defendant from the consequences of any act or omission on the part of the street railway. But however that may be, there is nothing in any statute to which our attention has been called, and there is no principle of law which relieves the defendant from the performance

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of a duty upon which the lives of citizens depend and which should be performed exactly and without abatement. It certainly could by no act of its own relieve itself from this duty and liability (*Storrs v. City of Ulica*, 17 N. Y. 109), and it has not been modified or dispensed with by the legislature. The license of the second corporation may have added another party to the negligent omission, but it did not release the defendant from the duty laid upon it by law, or transfer the consequences of its non-performance or negligent performance of that duty. The plaintiff might perhaps have had an action against the other or perhaps against both jointly. *Mudge v. Goodwin*, 5 C. & P. 190; 24 Eng. C. Law, 272; *Lynch v. Nurdin*, 1 A. & E. (N. S.) 29; 41 Eng. C. Law, 422; *Chapman v. N. H. R. R. Co.*, 19 N. Y. 341; *Colegrove v. N. Y. N. H. R. R. Co.*, 20 id. 492. Upon the facts found by the jury, it was at all events well brought against the defendant.

The defendant's counsel also asked the court to charge that if this injury arose and was caused by the rails of the street railroad company, that is, if it was caused by the wheel getting between the plank and a loose rail of the street railroad, then defendant is not responsible. The court: "If it was caused by the loose rail of the horse railroad company, of course your company probably would not be responsible for that, if it was in consequence of the rail." No defect was shown to exist in the rails of the street railway company. No one of them was shown to be loose. The difficulty was with the roadway and the planking. There was no foundation for the request made, and the charge given in answer to it was favorable to the defendant. But whatever duty was imposed upon the street railway company, it did not relieve the defendant from liability for its own negligence, or for want of care in keeping up and maintaining the street in proper condition. If the street railroad has erred in the omission to perform any duty in respect to the crossing, the law gives a remedy, but the defendant is not thereby released from its obligations to keep the crossing safe for public travel. For the omission to perform those obligations, the judgment appealed from has been rendered, and it should, I think, be affirmed.

Judgment affirmed.

All concur, except RAPALLO, J., absent.

NOTE BY THE REPORTER.—See note 28 Am. Rep. 565. In *Cuddy v. Horn*, Michigan Supreme Court, Oct. 12, 1881, it was held that where one was injured by the concurrent

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negligence of two public carriers, he could maintain a joint action against both. The court said: "The reason for holding a person riding in a private conveyance identified with the driver thereof, and therefore affected by the negligence of the latter, cannot fairly or justly be held applicable in cases like the present. In the case of a private conveyance the driver is under the direction and control of the passenger, and if not, the latter may well decline to intrust his safety further in such conveyance. When however a person enters a public conveyance, and certainly a railroad train or a steamboat, he has no such control over the movements of either, and whether he may have chartered such conveyance for a special purpose or not, yet for a faithful observance of the rules of law enacted for the running or navigation thereof, he cannot be held responsible in a case like the present, where the master is not his servant and is not subject to his direction or authority." The court cited *Colegrove v. N. Y. Cent., etc., R. Co.*, 20 N. Y. 498; *Cooper v. E. T. Co.*, 75 id. 118; and *Hillman v. Newington*, 23 Alb. L. Jour. 294; *Covington Transfer Co. v. Kelly*, post. In *Hillman v. Newington*, supra, it was held, that one injured by a diversion of water by eight persons acting independently of one another, can maintain an action against them jointly. See *Prideaux v. City of Mineral Point*, (43 Wis. 513), 28 Am. Rep. 558. The doctrine recognized in the Michigan case, as to imputed negligence of the driver of a private vehicle is denied in New York. *Robinson v. N. Y. Cent., etc., R. Co.*, 66 N. Y. 11; s. c., 23 Am. Rep. 1, and note, 4; *Masteron v. N. Y. Cent., etc., R. Co.*, ante. The contrary was held in *Phil. & Reading R. Co. v. Boyer*, Pennsylvania Supreme Court, Jan. 31, 1881. "The rule in Pennsylvania is that when a passenger on a carrier vehicle is injured by a collision resulting from the mutual negligence of those in charge of it and another, the carrier alone must answer for the injury. *Lockhart v. Lichtenhaler*, 20 Wr. 151."

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(84 N. Y. 363.)

Surety — death of co-surety — liability of estate to contribute.

The estate of a deceased co-surety is liable to contribute in a suit by a co-surety.

ACTION by a co-surety for contribution. The opinion states the facts. The plaintiff had judgment below.

Frank R. Perkins, for appellant.

A. G. Rice, for respondent.

FINCH, J. The plaintiff and the defendant's intestate, in the life-time of the latter, were joint sureties in an undertaking given in an action for the claim and delivery of personal property, in which action one Parshall was plaintiff, and the sheriff of Erie

county defendant. Neither of the sureties were parties to that action, but executed the undertaking for the accommodation of the sheriff or those claiming through him. Before a trial of that litigation one surety, John G. Allen, died, and the present defendant was duly appointed his administrator, and thereafter judgment was obtained in the action in which the undertaking was given, and the surviving surety, by reason of his liability thereon, compelled to pay the sum of \$1,592.74. For the one-half part of this he now claims contribution from the estate of his co-surety, and the sole question presented and argued is, whether such contribution can be enforced. The question is hardly an open one in this State. It was held in *Bradley v. Burwell*, 3 Den. 61, that the death of one of two or more sureties did not relieve his estate from the liability to contribute, and the decision was put upon the ground that the law implies a contract between co-sureties to contribute ratably toward discharging any liability which they may incur in behalf of their principal, such contract originating at the time they execute the original undertaking, and that in the case of the death of either this obligation devolves upon his legal representatives, and is like any other contract made by one, in his life-time, to pay money at a future time, absolutely or contingently, who dies before any breach of the contract. The English cases on the subject were cited in the opinion of the court, as also those of Massachusetts: and it is also to be observed, that in the argument then made, the case of *Waters v. Riley*, 1 Harr. & Gill. 305, was cited by the learned counsel who contended against the liability of the deceased surety's estate, as it is again brought to our attention here. That case was decided by a divided court, and like the authorities in Pennsylvania went upon the ground that the liability of the sureties to each other rested, not upon contract express or implied, but was the product and the mere creature of the equity. In *Bradley v. Burwell* the same ground was distinctly taken on the argument, and advocated by an ability which never left unsaid what was worthy to be uttered, and yet the court determined that the liability of the co-surety rested upon an implied contract to contribute, originating at the date of the joint signature, and which bound the estate of one or more who died before the principal liability accrued. The learned counsel for the appellant seems to have been led into a doubt of the authority of *Bradley v. Burwell*, and to a hope that we would disregard it, from what has been said by us in cases where

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the creditor, and not the co-surety, was pursuing a supposed remedy against the estate of a deceased surety. In those cases which were cases of joint obligation, we have held that such estate is absolutely discharged, both in law and equity; that death puts an end to the obligation of the surety; that the survivor only is liable; stating the conclusion with some force and strength of phrase.* But the doctrine was neither new nor recent. The same thing had already been said in *Bradley v. Burwell* without at all modifying the view expressed as to the liabilities of the sureties between themselves. The argument, from general expressions, wrested from their aim and purpose, detached from their setting, is often plausible, but rarely useful or effective. We have often held, as between the creditor and the estate of a deceased surety, that the joint obligation of the latter ended with his death. We are not yet prepared to decide that his several obligation, originating at the date of the common signature, to contribute ratably to the payments compelled from his associates, also terminates at his death. In *Norton v. Chons*, 3 Den. 130, the sureties were all living, and the precise question did not arise, but it was again held that while contribution between sureties was founded on a general principle of equity and justice, yet what had been an equitable had become a legal right, and that in such case the law will, for all the purposes of a remedy, imply a promise of payment. In the case of *Tobias v. Rogers*, 13 N. Y. 66, the surety was held not liable to contribute because relieved in his life-time from all liability, either as obligor or co-surety, by a discharge in bankruptcy. It was there said that the defendants in the replevin suit could have released one of the sureties with the assent of the other, and that to the act of the legislature, providing for a discharge in bankruptcy, such other surety in common with every other citizen, is presumed to have assented. The reasoning has no application to the case of a deceased surety. And while the court added that contribution was not founded upon contract, it was further said that the law following equity will imply a promise to contribute in order to afford a remedy. The justice of such a rule is apparent. Originating in equity, it has been grafted upon the law with the aid of an implied promise to secure the legal remedy. We see no reason to reverse it, but every consideration of equity and justice

* See *Wood v. Fish* (63 N. Y. 245), 20 Am. Rep. 528.

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leads us rather to maintain and enforce it. The decision of the court below was therefore right.

The judgment should be affirmed, with costs.

Judgment affirmed.

All concur.

HIBERNIA NATIONAL BANK V LACOMBE.

(84 N. Y. 367.)

Contract — place of — statutory construction — negotiable instrument — comity.

The plaintiff, a National bank of New Orleans, purchased of the M. & T. bank located there, a draft on bankers in the city of New York, to the plaintiff's order. Subsequently the M. & T. bank was put in liquidation under the laws of Louisiana, and the defendants were appointed commissioners to receive all its property. The draft being duly dishonored, the plaintiff brought this action on it in New York, and attached funds of the M. & T. bank in that State. The defendants as such commissioners claimed the attached property. *Held*, (1) that the plaintiff was a non-resident of New York, and that the cause of action arose within that State, within the meaning of the New York statute; (2) that the lien of the attachment was superior to the rights of the defendants.

ACTION on a draft. The opinion states the facts. The plaintiff had judgment below.

Wm. Henry Arnoux, for appellants.

Thomas S. Moore, for respondent.

DANFORTH, J. The plaintiff is a corporation created under an act of Congress of the United States providing for the organization of banking associations. "The Mechanics and Traders' Bank" was also a banking corporation created under the laws of Louisiana, and each corporation had its place of business in the city of New Orleans. On the 17th day of March, 1879, the plaintiff purchased for value of the "Mechanics and Traders' Bank" a check made by them on that day, addressed to "M. Morgan's Sons," bankers in the city of "New York," whereby they directed that firm to pay to

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the order of the plaintiff \$10,000. On the 26th of March, 1879, the check was duly presented to the payees for payment. It was refused. The check was duly protested and notice thereof given to the drawer. On the 27th day of March, 1879, this action was commenced against the "Mechanics and Traders' Bank" as drawer, and an attachment issued thereon was served on M. Morgan's Sons, who had funds of the drawer in their hands. Prior to that day, but after the delivery of the check to the plaintiff, the "Mechanics and Traders' Bank" was placed in liquidation under the laws of the State of Louisiana, and certain persons were by the court in that State appointed commissioners to take possession of and administer its assets. They were afterward made defendants in this action, and set up in defense their appointment under the circumstances above mentioned, their title through it to all the property of the bank, and also that the Supreme Court of this State had no jurisdiction to issue the attachment herein or entertain the action. The plaintiff has had judgment, and the defendants insist upon these objections among others as grounds for reversing it :

First, as to the jurisdiction of the court : At the time the action was commenced, the Code of Procedure was in force, and section 427 provided, among other things, that an action against a foreign corporation might be brought in the Supreme Court by a plaintiff not a resident of this State, "where the cause of action shall have arisen within the State." For this purpose a foreign corporation is to be regarded as a non-resident. What does the statute mean ? We have learned from Coke that "an action is the lawful demand of one's right," and from the Code that complaint therein "must contain a statement of the facts constituting a cause of action." In any given case, then the cause of action must arise upon the facts, and these appearing, we have only to inquire where they occurred. The complaint in this case sets out the check, shows the performance of those things which the law merchant prescribes as necessary to be done to change the conditional liability of the drawer into an absolute one, and that the proper steps were taken to change it. There are thus placed before us two classes of facts ; first, the contract and its obligations ; second, the things done in pursuance of the contract. The argument for the appellants assumes that the first constitutes the cause of action, and as the contract was made in Louisiana, therefore excludes jurisdiction from our courts. Authorities are not needed to show that in general every contract is

to be expounded and enforced by the law of the place where it is made. But the curious will find the ancient ones collected by Wedderburn, of counsel in *Robinson v. Bland*, 1 Wm. Bl. 256, and more modern ones in Story's Conflict of Laws, *infra*. Thus if a bill is drawn in France, and then indorsed in a way which is sufficient here but insufficient there, the indorsement would be held void. *Trimbey v. Vignier*, 1 Bing. N. C. 151. But this general rule admits of an exception, as where the parties at the time of making the contract had a view to a different kingdom. MANSFIELD, C. J., in *Robinson v. Bland*, *ante*, or as put by Mr. Justice THOMPSON in *Smith v. Smith*. 2 Johns. 241; 3 Am. Dec. 410, "unless the parties had a view to its being executed elsewhere, in which case it is to be considered according to the laws of the place where the contract is to be executed." Therefore the English court held, in *Robinson v. Bland*, that a bill of exchange drawn in France by John Bland upon himself in England, payable to the order of the plaintiff, was invalid because given for a consideration void by English law, saying: "The bill is made payable in England and is therefore an English transaction and to be governed by the local law." And conversely in *Rouquette v. Overmann, etc.*, L. R., 10 Q. B. 525, where the subject under consideration was the liability of certain persons, who as drawers residing in London, had there made a draft upon certain French bankers in Paris, payable to the drawers' own order, but indorsed by them to the plaintiff. The drawers having been charged as drawers under the French law were sued by the plaintiff in London, and it being objected that the contract of the drawer was to be construed according to the laws of England, where he resided and where he made the bill, the court were of a different mind, saying: "It is unnecessary to consider how far this position may hold good as to matter of form, or stamp objections, or illegality of consideration, or the like. We cannot concur in it, as applicable to the substance of the contract, so far as presentment for payment is concerned, still less to a formality required on non-payment to enable the holder to have recourse to an antecedent party on the bill. Applied to these incidents of the contract, this reasoning appears to us altogether to overlook the true nature of the contract, which a party transferring for value the property in a bill of exchange makes with the transferee." * * * "He engages as surety for the due performance by the acceptor of the obligations which the latter takes on himself by the acceptance. His liability therefore is to be

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measured by that of the acceptor, whose surety he is ; and as the obligations of the acceptor are to be determined by the *lex loci* of performance, so also must be those of the surety ;” and thus shows that the drawer contracted in view of the laws of the country where the bill was to be paid, and to such an extent that he was held to be affected by changes in the local law, viz. : the law of France. In that case also *Allen v. Kimble*, cited here by the appellants is criticised and found to have “ nothing to do with the law relating to bills of exchange ;” and it is said that in deciding *Gibbs v. Fremont*, also cited by the appellants, *Allen v. Kimble* was followed, and the court withholds “ any opinion as to the soundness of the decision.” *Gibbs v. Fremont*, 9 Ex. 25, decided that a bill of exchange drawn in California on Washington, in the District of Columbia, bore interest at California rate. But this is not only questioned by the later English cases, *supra*, it is contrary to the doctrine of earlier English cases, and to those of this State, some of which are collected in the note to page 32, 9 Ex., and to the principle upon which *Dickinson v. Edwards*, 77 N. Y. 573 ; s. c., 33 Am. Rep. 671, was placed, and to the reasoning and exposition of the law governing the interpretation of such a contract therein stated. And so in *Fanning v. Consequa*, 17 Johns. 510 ; 8 Am. Dec. 442, the general rule and the exception is stated in the same manner, viz. : If by the terms or nature of the contract it appears that it was to be executed in a foreign country, then the place of making the contract becomes immaterial. And in *Hyde v. Goodnow*, 3 N. Y. 267, it is declared that the rights of the parties to a contract are to be determined by the laws of the place where the contract is to be performed. To the same effect is the doctrine of the common and civil law wherever administered, as may be seen by referring to the cases cited in those above noted, and in the more numerous ones collected by Judge STORY in support of the same proposition. Story on Conflict of Laws (7th ed.), §§ 239-244. But again the law of the place of contract is not necessarily one place. It is the law of all the places to which and for the purposes for which it has reference. A bill of exchange therefore is to be construed according to the laws of each place at which the contract contemplated that something is to be done by either of the parties. This is illustrated in *Rouquette v. Overmann*, *supra* ; *Horne v. Rouquette*, 3 Q. B. Div. 514 ; by the decision of this court in *Everett v. Vandryes*, *infra*, and in *Lee v. Selleck*, 33 N. Y. 615. The note in question, in the

last case, was made by Benjamin Selleck, in and dated at New York city, payable to the order of George Selleck, in Morris, Ill., and at that place he indorsed it and sent it to the maker by mail. at Beloit, Wis. The maker sent it in like manner to the plaintiff in New York city. The indorser having been duly charged was sued in this State by publication as a non-resident, and money in bank in New York city belonging to him was attached. The defense set up was that he indorsed the note in Illinois, and that by the laws of that State an indorsee could not be made liable until judgment and execution had been obtained against the maker. At the Circuit the defendant had judgment upon the ground that the law of Illinois governed. The General Term reversed it, stating the general rule governing contracts, as above referred to, and holding that the maker, by the terms of his contract, was to perform it in Illinois; but that the indorser was bound, as by an independent contract, to pay in New York, SUTHERLAND, J., saying: "By indorsing the note George Selleck undertook, that if when duly presented it was not paid by the maker, he, the indorser, would, upon being properly notified of the non-payment, pay the same to the indorsees or other holder. Where? Can there be a doubt that the indorser and indorsees contemplated, if the indorsees retained the note, that in default of payment by the maker the indorser was to pay the indorsees in New York? The maker, by the note, promised to pay at Morris, Ill., but the indorser by his indorsement promised to pay to the indorsees in New York." As to him, therefore the court held that the law of New York, and not that of Illinois, applied. Upon appeal to this court the conclusion of the General Term was approved, PORTER, J., saying: "The engagement of the indorser, though auxiliary in its character, was an independent contract, and could only be fulfilled by direct payment to the plaintiff in New York," and the judgment was affirmed. The general principles involved in the above discussion will, if applied to the facts in this case, render it easy of solution. In substance, the drawer undertakes that there shall be paid to the holders of the check the sum of money therein mentioned at the place named. These things are of the essence of the contract, and unless performed, the object of the payee is defeated. It purchased the check in New Orleans, because, as we may suppose from the paper itself, it wanted to remit money to New York, and for this it paid a valuable consideration. Although the paper is dated in

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New Orleans, the drawer agrees that the payer shall receive the amount named in New York. We see therefore that the buyer of the draft does not want the money in New Orleans. The drawer of the draft has the money in New York, and so the exchange is agreed upon. The check is evidence of the contract, and under the general law is the contract itself. In view of this the parties have contracted. The drawer undertakes that the drawee shall be found in the place where he is described to be, and shall have effects in his hands, and from these, or upon other consideration (good as between him and the drawer, and with which the payee has nothing to do), pay the check. He undertakes therefore that it shall be paid when presented, and although the drawee is designated to make the payment, he, as between the payee and drawer, is only an instrument of the drawer, and the latter, therefore, since he undertakes for his agent's act, "undertakes that it shall be done at all events." *Mellish v. Simeon*, 2 H. Bl. 378. The drawee at this stage of the transaction is under no obligation to the payee; but by receiving the check the payee agrees in the first instance to go to the drawee and give him an opportunity to comply with the direction of the drawer, and if he does not, and the drawer is notified thereof, the latter becomes absolutely bound to pay the amount named in the check. Where is this contract to be performed? Clearly in New York city. Nor could it be performed elsewhere.

The only object of the parties, payee as well as drawers, in entering upon it, was to have the money paid in New York. This only was in contemplation of the parties. As is said in 2 Dan. Neg. Inst., page 685: "He, the drawer, has contracted that the amount shall be there paid by the hand of B.," the drawee. Any other construction would render the contract meaningless, and productive only of mischief. The plaintiff in New Orleans wants money in New York. Defendant promises it shall be there for him and relying on that, the plaintiff pays in New Orleans the agreed amount. It is obvious that it cannot be ascertained whether the promise is kept until it is taken to New York, and then, upon the theory of the appellant, if it is not performed, the promise is to be returned to the drawer in New Orleans, and then, in New Orleans, the money is to be repaid. And thus after delay the plaintiff is restored to his original desire and must find some other method of transferring his money to New York. There is before us a single undertaking. It could be performed only in New York, and the general law above referred to

shows that the rights of the parties are to be governed by its laws as the *lex loci*. Nor is the question a new one. In this court it has been declared as "too well established to require a reference to books." *Everett v. Vendryes*, 19 N. Y. 436. It was there distinctly presented. The action was by the indorser of a bill of exchange, drawn in New Grenada upon a corporation in New York city. The indorsee sued the drawer of the draft. The drawer defended. He had been charged as drawer by reason of default of the drawee. He denied the indorsement by the payee. He also sought to amend his answer by setting up the law of New Grenada, under which he claimed the draft was not well indorsed. The decision of the court shows the difference between the rules applicable to the contract of the drawer and that of the indorser. Holding that the contract of the former was to be governed by the law of the place where it was to be performed, saying, "By drawing the bill the defendant undertook that the drawee in New York would pay it to the payee or his order, and if the drawee did not so pay it, he himself would make such payment." What payment? Why, the payment called for by the draft — a payment in New York. And such is the construction to be given to the defendants' contract here. The case also illustrates the principle above adverted to, that more than one law will apply to the same bill of exchange. Holding, as in *Lee v. Selleck*, *supra*, that the contract of the indorser would be governed by the law of New Grenada, where it was made. The drawee was held under the law of the place of performance, and the indorser under the place of contract. And this accords with well defined principles as stated in 2 Dan. Neg. Inst., page 684, and avoids the inconsistency of the law in respect thereto, which the learned author deprecates. *Id.* 685. Other considerations lead to the same result. The check was written in Louisiana, but the engagement was consummated in this State. By its terms it was necessary to present it to the drawee, and from that act and its consequences came the final obligation of the drawer. We are thus brought to examine the other or second class of facts, viz., the things done in pursuance of the contract; for without them no cause of action had arisen against the drawer. *Harker v. Anderson*, 21 Wend. 373. The payee then must present the check, and if paid, the conditional obligation of the drawer is discharged. It was presented but not paid, and notice, according to the law merchant, was given to the drawer; not personally, or New Orleans, but by depositing it in the post-office in New York.

At that moment the cause of action arose, and the obligation of the defendant was perfect. *Walker v. Bk. of the State of New York*, 9 N. Y. 582. And this is so, although the drawer resided in one State, and the presentment and notice occurred in another. The holder might redraw for both interest and damages, or he might sue. In *Daniels, supra*, § 1213, the author says, where a bill is dishonored for non-acceptance a right of action accrues at once against the drawer. "It is plain where there was no need of acceptance the same result would follow non-payment." The learned author, in support of his dictum, cites *Robinson v. Ames*, 20 Johns. 146 ; 11 Am. Dec. 259. That was assumpsit against the drawers of a bill made by them in Georgia (where they lived) upon Townshend & White, merchants in New York city. And being protested, notice was sent by mail, to the drawers, directed to them at their residence. It was not suggested that this was insufficient. Indeed, the rule is elementary, and the liability is one of the effects of the contract. There was, first, the right conferred on the payee; second, the duty of the drawer to fulfill it; third, the right of action which arises from the non-fulfillment of it. The first of these may be said to have happened in Louisiana at the moment when the check was delivered to the payee; the second could only happen in this State, and the third was consequent thereto. The learned counsel for the appellant says: "It is true the cause of action was complete upon notice," but contends that "notice did not occur here. Notice was given to drawer, and he was in New Orleans ; any notice given here would be absolutely worthless." In that view these proceedings against the drawer could only be taken in New Orleans ; or before action brought in this State, the drawer must actually receive the notice. It is perhaps enough to say that our preceding observations as to the nature of the drawer's contract and his duty of performance do not admit of either result. If the holder of a protested bill may at once sue or at once redraw (*Story on Bills*, 331), it is because a right attaches upon the concurrence of the above events, and I know of no authority, nor has any been cited, which entitles the drawer of a check to a moment's delay on the part of the holder. Having one dishonored obligation of the drawer he is not required to subject himself to further disappointment by calling upon him with another request, and in the language of PARKER, C. J., in *Shed v. Brett*, 1 Pick. 411 ; 11 Am. Dec. 209, "it may be asked 'who would take a bill or note remitted from New York if this doctrine be correct ?' And if the parties liable be beyond

sea, such instruments would be mere waste paper. If the bill should not be accepted, * * * the fortunate holder, with property belonging to the drawer * * * before his eyes, must remain an idle spectator of the scramble of other creditors for it, or suffer it to be withdrawn by the debtor himself, without the power of arresting it. This cannot be sound doctrine." We conclude therefore that the cause of action in the case before us arose where the draft, by its terms, was payable, when payment was refused and notice given; these things constitute a cause of action, and it has risen within this State. This construction of the words of the statute (§ 427) agrees with that given by the English courts to similar language in the statutes of that country. In *Durham v. Spence*, L. R. 6 Ex. 46, PIGOTT says: "What did the legislature mean when it spoke of the cause of action arising in England? Did it mean what has been termed the whole cause of action; that is, both the contract and the breach? I think that is not the true construction. I understand by cause of action that which creates the necessity for bringing the action. No doubt to make the act or omission complained of a cause of action, a contract must have preceded; but so also a negotiation must have preceded the making of the contract. Yet I should not include that negotiation, nor any of the other circumstances that might form part of the necessary evidence in the cause, as the ground work of the cause of complaint, but only the cause of complaint itself, that is the breach;" and adds, "we are not justified in introducing into the statute a word not found there, and saying that where the legislature says cause of action it means whole cause of action, and not that which the words used naturally express; the fact which gives rise to the action." CLEASBY, B., says: "The cause of action must have reference to some time as well as some place. Does then the consideration of the time when the cause of action arises give us any assistance in determining the place where it arises? I think it does. The cause of action arises when that is not done which ought to have been done; or that is done which ought not to have been done. But the time when the cause of action arises determines also the place where it arises, for when that occurs which is the cause of action the place where it occurs is the place where the cause of action arises." MARTIN, B., differed, but upon grounds not affecting our inquiry. To the same effect are many cases in our own courts, referred to by the General Term in its opinion and cited by the respondent here, and although, as the

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appellants say, these are not of binding authority, yet they express the opinion of very able and learned judges, and are therefore entitled to great respect. It is satisfactory to find that we are not called upon to decide differently. We think therefore that the action was well brought, and it follows that the plaintiff has a right to its enforcement in any manner prescribed by the law of this State.

The remaining question relates to the claim made by Messrs. Lacombe and others, commissioners appointed by the court in Louisiana. Neither the law nor the adjudication under which they were appointed can have any operation here. They are strictly local and affect nothing more than they can reach. For the rule, as we conceive, is well settled that an assignment by virtue of or under a foreign law does not operate upon a debt, or right of action, as against a person in this State. The plaintiff, as we have seen, although a foreign creditor, is rightfully in our courts pursuing a remedy given by our statutes. It may enforce that remedy to the same extent and in the same manner and with the same priority as a citizen. Any other construction would make the permission of the statute a form without benefit; a formality, and not matter of substance; a mere delusion. Once properly in court and accepted as a suitor, neither the law nor court administering the law will admit any distinction between the citizen of its own State and that of another. Before the law and in its tribunals there can be no preference of one over the other. *Abraham v. Plestoro*, 3 Wend. 548; 20 Am. Dec. 738; *Johnson v. Hunt*, 23 id. 91; *Hoyt v. Thompson*, 5 N. Y. 351; *Merrick v. Van Santvoord*, 34 id. 217; *Blake v. Williams*, 6 Pick. 286; 17 Am. Dec. 372. The plaintiff, by the process of our courts, has acquired a right, of which no principle of national comity requires us to deprive it. It is said by Chancellor KENT, in *Holmes v. Remsen*, 4 Johns. Ch. 470; 8 Am. Dec. 581, to be "admitted in all the cases that every country may by positive law regulate as it pleases the disposition of personal property found within it, and may prefer its own attaching creditor to any foreign assignee, and no other authority has a right to question the determination;" and to the same effect are the observations of PLATT, J., in *Hoimes v. Remsen*, 20 Johns. 254; and so it has been held through various intermediate cases to that of *Kelly v. Crapo*, 45 N. Y. 86; s. c., 6 Am. Rep. 35, in which the late chief judge of this court regards the doctrine that a title acquired under foreign bank-

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rupt or insolvent proceedings will not prevail against the rights of attaching creditors under the laws of the State, where the property is actually situated, so well settled, as to make it quite unnecessary to review the authority or the history of the decisions on that subject. The question, then regarded as too fully settled to be open for review, we see no reason to again discuss. That case, it is true, was reversed by the Supreme Court of the United States, but upon grounds not affecting the principle here involved. It follows that however fatal the adjudication in Louisiana may be to the existence of the defendant corporation in that State, it cannot deprive its creditors of the remedies afforded by other forums against its property. This action was commenced before the intervention of the commissioners, and to it they have established no defense, nor shown sufficient reason for defeating the priority of lien acquired by the proceedings therein. *Willitts v. Waite*, 25 N. Y. 586; *Folger v. Columbian Ins. Co.*, 99 Mass. 267. If the plaintiff has by its proceedings obtained an advantage against the law and adjudications of Louisiana, it is a resident of that State, and as such, the appellants' counsel contends, may there be overhauled and made to account for what it has gained here. To that remedy, if it exist, the defendants may properly be remitted. The other points raised by the ingenious counsel for the appellants have been carefully considered by us, as have also the authorities cited in their support. The considerations already stated indicate that in our opinion they disclose no error in the decision of the court below, and that the judgment appealed from should be affirmed.

Judgment affirmed.

All concur, except RAPALLO, J., absent.

 GRAHAM V. FIRST NATIONAL BANK OF NORFOLK.

(84 N. Y. 383.)

Marriage — conflict of law — wife's right to dividends of foreign corporations, paid to husband.

A husband and his wife lived in Maryland. The wife owned stock in a Virginia bank. The husband was a cashier, stock-holder, and manager of two Maryland banks, with which the Virginia bank kept accounts in his name as cashier. Dividends declared by the Virginia bank on the wife's stock

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were paid to the Maryland banks, or credited in such accounts, and allowed on settlement. The common-law rule, as to the relation of husband and wife, prevails in Virginia. Held that a finding of payment of the dividends to the husband was warranted, and that such payment discharged the defendant from liability to the wife or her assignee.

ACTION to recover dividends. The head-note and opinion state the facts. The defendant had judgment below.

Malcolm Campbell, for appellants.

Francis C. Barlow, for respondents.

FINCH, J. The ownership of one hundred and ninety-six shares of stock, which stood upon the books of the Norfolk Bank, in the name of Eliza A. Graham, must be deemed vested in her, whether the purchase-price was paid by her or by her husband, and notwithstanding the evident control of it, for his own purposes, by the latter. No creditors of the husband intervene to affect the question, and as between Mrs. Graham and the bank, her right as owner must be admitted. The dividends declared during such ownership belonged to and were payable to her; and assuming for the present that her assignment to plaintiffs was effective to transfer such right to them, there remain for discussion only the two questions, whether the Norfolk Bank did, in fact, pay the dividends sued for to the husband of Mrs. Graham; and whether, by such payment to him, the liability of the bank to her was discharged. The referee has found that such payments were, in fact, made to James Graham, the husband. At the time of these transactions he appears to have been the cashier of the Elkton National Bank, and of the Farmers and Merchants' Bank, of Elkton, in both of which he was largely interested, and the principal and controlling agent, and both of which banks were situate in the State of Maryland, in which State he and his wife resided. The evidence tends to prove that the dividends in question were, in fact, paid to James Graham, cashier, and therefore to the Elkton or Farmers and Merchants' Bank. Two of the dividends are proved to have been so paid, with his assent and by his direction given at the time, and one of them with his subsequent approval and ratification. The larger dividend of the three was paid by the delivery, to the Elkton Bank, of the amount in its own bills, and the others by a credit of

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their respective sums to Graham, as cashier. While it is claimed, that at the date of these credits there was nothing due from the Elkton Bank to the Bank of Norfolk, and therefore no debt upon which the credit could apply, it is yet uncertain, upon the evidence, how the accounts actually stood, and the credit to Graham, as cashier, by his direction, or with his assent and approval, at a time when he conceded the existence of a large indebtedness which he was interested to reduce, was a good payment to him, and an application of the debt of the bank to his wife to the liability of one or both of the Elkton banks, upon which the respective parties appear to have acted by a settlement between the banks, and the benefit of which, as against the Elkton banks, Graham must be presumed to have had. While the facts are not free from difficulty, a careful examination has satisfied us that there was sufficient evidence to warrant the finding of the referee, and to make it conclusive on this appeal.

The question of law however remains, whether the payment by the bank to James Graham was a good payment to his wife in whose name the stock stood upon the books of the bank. The Norfolk Bank was located and transacted business in the State of Virginia. It is proved that in that State the common law prevails as it respects the relation of husband and wife, and that within that jurisdiction the husband has the absolute right to reduce to his own possession, and use for his own benefit, the personal property of the wife. The contract out of which grew the right to the dividends was both made and to be performed in Virginia, and if the payment by the Bank of Norfolk to James Graham is to be tested and measured by the law of that State, it is conceded to have been good and an effective discharge of the liability to the wife. It is denied however that the law of Virginia applies, and it is argued that the law of Maryland, the *lex domicilii*, governs and controls the capacity of the parties to receive payment, and the duty of the bank in making it. The general subject of a conflict between the law of the domicile and that of the place of contract has been fully discussed by Story and Wharton in their respective treatises. Story on Conf. of Laws, § 374 *et seq*; Whart. on Conf. of Laws, § 393, etc. Whatever is useful in the learning of the continental jurists, or the decisions of the English courts, has been made tributary to conclusions which we may safely follow, where at least they are in harmony with the ruling of our own tribunals. It must then be

granted that movables or personal property, by a fiction of the law, are deemed attached to the person of the owner, and so present at his domicile, whatever their actual situation may be. The law of the domicile therefore naturally governs their transfer by the owner, and their disposition and distribution in case of his death. So far the authorities substantially agree, differing only in the reasons upon which the rule is founded, and by which it is to be justified. When however the question passes beyond the disposition of the personal property by the party, or the act of the law, within the jurisdiction of the domicile, and busies itself with the inherent character of the property, and of the contracts which both create and constitute it, elements of discord arise, and the authorities are not easily to be reconciled. It is readily seen that the inherent character of the contract must usually be the product of the jurisdiction in which it originates, and hence it follows, and has been justly held, that the construction, nature and effect of a contract are to be determined by the *lex loci contractus*. Story on Conf. of Laws, § 321. But no such question is here. There is no dispute about the construction of the contract to pay dividends. All are agreed upon that. There is no trouble as to the nature of the contract or its effect. Its validity, and the duty of payment to the stockholders, is conceded on all sides. The real question is over the performance of the contract, or its discharge by payment; and that involves the capacity of the husband to receive and discharge the debt, represented by the dividends, *jure mariti*. On the one hand it is argued that this question of capacity, of the rights and powers flowing from the marriage relation, is dependent upon the law of the domicile, and utterly unaffected by the foreign law, and the former must therefore dictate and measure the authority and power of the husband and the right of the wife. That is in general, true as between themselves, and relatively to each other. It does not follow that it is true as between them and a debtor in another State, whose contract was made there, and is there to be performed. Such a fact introduces a new element into the problem. It would scarcely be endurable if a railroad or insurance company declaring dividends in this State should be bound to pay stockholders in other States according to the foreign laws, and in accordance with different and varying codes. Observing the evil result we must remember that, in a case like the present, it is a legal fiction which attaches the property to the domicile,

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and the actual fact may be otherwise. Judge COMSTOCK, in *Hoyt v. Commissioners of Taxes*, 23 N. Y. 228, well says, "that the fiction or maxim, *mobilia personam sequuntur*, is by no means of universal application. Like other fictions it has its special uses. It may be resorted to when convenience and justice so require. In other circumstances the truth and not the fiction affords, as it plainly ought to afford, the rule of action." And Judge STORY says that the legal fiction "yields whenever it is necessary for the purposes of justice, that the actual *situs* of the thing should be examined." Confl. of Laws, § 550. And hence has been very steadily sustained the general rule that a contract, made in one State and to be performed there, is governed by the law of that State, and the further rule, which is a logical result, that a defense or discharge, good by the law of the place where the contract is made or to be performed, is to be held, in most cases, of equal validity elsewhere. Story on Confl. of Laws, § 331; *Thompson v. Ketcham*, 8 Johns. 189; 5 Am. Dec. 332; *Bartsch v. Atwater*, 1 Conn. 409; *Smith v. Smith*, 2 Johns. 235; 3 Am. Dec. 410; *Hicks v. Brown*, 12 id. 142; *Sherrill v. Hopkins*, 1 Cow. 103; *Peck v. Hibbard*, 26 Vt. 702; *Bowen v. Newell*, 13 N. Y. 290; *Cutler v. Wright*, 22 id. 472; *Waldron v. Ritchings*, 3 Daly, 288; *Jewell v. Wright*, 30 N. Y. 259; *Willitts v. Waite*, 25 id. 577. In these cases the fiction yields to the fact; the *situs* attached theoretically to the person of the owner, and therefore to his domicile, surrenders to the actual *situs* where justice and convenience demand it. The illustrations are various, but founded upon a common reason and justification. For the purpose of taxation the actual *situs* controls, and the fiction which carries the personal property to the domicile of the owner in disregarded. As to days of grace affecting the maturity of a contract and determining when it becomes due, the *lex loci* is applied. The defense of infancy is to be sustained or denied according to the rule of the place of contract and performance. So also as to the disability of coverture, and the rate and legality of interest. And even an assignment, *in invitum*, compelled by the local law, will transfer property in another State where suitors in the courts of the latter are not thereby prejudiced. These rulings and others of the like character have been modified and moulded in their application by the influence of varied circumstances, but concur in the general principle upon which the *lex loci* has been applied. The point pressed here is that while it controls the construction and validity of the contract, it does not settle the cap-

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city of the non-resident parties. But to found a ruling upon such a test would involve us in an ambiguity. Capacity may effect the power of transfer and the direction and details of distribution. In that respect it is often shaped and settled by the law of the domicile. But it also affects the validity of a contract and the mode and manner of its dissolution or discharge. In that respect it is generally governed by the law of the place of contract. Story concludes, after a full and learned review of the insuperable difficulties which attend an effort to extend the capacity or incapacity created by the law of the place of domicile to foreign States, that the true rule is that "the capacity, state and condition of persons according to the law of their domicile will generally be regarded as to acts done, rights acquired and contracts made in the place of their domicile, touching property situate therein," but as to acts done, etc., elsewhere, the *lex loci contractus* will govern in respect to capacity and condition. We cannot make therefore the law of the domicile in and of itself a solvent of the doubts and difficulties likely to arise even as to questions of capacity. In the present case the contract was made in Virginia and to be performed there. The dividends were there declared and payable. They were paid to the husband who could lawfully receive and appropriate them, by the law of Virginia, to his own use and benefit. The payment was therefore valid and effectual, and discharged the bank from its liability. The rights of the wife after such payment, as between herself and her husband under the law of Maryland, might prove to be a very different question. It is sufficient for the purposes of this case that the payment, which the referee finds was in fact made to the husband, discharged the liability of the bank and furnished a defense to the action.

The judgment should be affirmed, with costs.

Judgment affirmed.

All concur, except RAPALLO, J., absent.

LOFTUS V. UNION FERRY COMPANY OF BROOKLYN.

(84 N. Y. 455.)

Ferry — negligence — infant.

The defendant ferry company landed passengers from boats upon a pontoon secured to the shore, and occupying the width of the slip except some eight

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or twelve inches left for play on each side. On each outer edge of the pontoon was a sill six or eight inches high, surmounted by an arched rail, three feet above the sill at the centre, and supported by stanchions six feet apart. There was also a rail twenty or twenty-two inches above the sill, and parallel with it. A child, six years old, in leaving one of the boats, fell through one of the openings in this guard, and was drowned. The pontoons had been in use five or six years, and was similar to the other ferry pontoons. No similar accident had ever happened. *Held*, that the defendant was not liable. (*See note, p. 536.*)

ACTION of damages for death of plaintiff's intestate by negligence. The opinion states the facts. The plaintiff had a verdict, which the General Term set aside.

Charles J. Patterson, for appellant.

B. D. Silliman, for respondent.

ANDREWS, J. The charge of negligence is based solely upon the alleged insufficiency of the guard on the side of the bridge or float, adjoining the passage-way for passengers going upon or leaving the ferry-boat. It is not claimed that the bridge was not in other respects properly constructed. It did not fill the entire space between the piers. On each side there was a space open to the water of from eight to twelve inches between the bridge and the adjoining pier. This space was left for the movement of the bridge caused by the tides and the impact of the boat on entering the slip. The guard was a frame of wood constructed by laying a sill lengthwise of the bridge along the outer line of the passage-way and rising six or eight inches above the floor of the bridge, and spanned by an arched rail extending from end to end, which at the center was about three feet above the sill, with stanchions in the sill about six feet apart, and intermediate the sill and the arched rail was another rail parallel with the sill and about twenty-two inches above it. This left a space in the guard above the sill six feet wide and twenty-two inches high. The bridge was constructed five or six years before the accident, and was similar to the bridges at the other ferries of the defendant. It was conceded on the trial that over forty millions of people passed annually over the defendant's ferries, and until the occurrence in question no accident had happened from any person falling or getting through the spaces in the guard. The intestate was a child six years old. On the evening of July 3, 1878, the intestate's mother

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with her two children (the youngest, an infant, nineteen months old), entered the defendant's ferry-boat at Brooklyn to go to New York, and on reaching the New York side of the river, after the boat had been secured and after most of the other passengers had left the boat, she started with her children to pass over the bridge. The intestate walked in front of or near his mother, who had the other child in her arms. In some manner, not clearly explained, the boy fell into or got through the opening in the guard, and falling into the water between the bridge and the pier, was drowned. The evidence perhaps justifies the inference that the child, frightened and startled by the boisterous noise and the running of two other boys who were leaving the boat, tripped or stumbled over the sill, and falling toward the pier, was precipitated into the water.

We think this case is governed by the cases of *Dougan v. Champlain Trans. Co.*, 56 N. Y. 1; *Crocheron v. North Shore Staten Island Ferry Co.*, id. 656; and *Cleveland v. New Jersey Steamboat Co.*, 68 id. 306.

The defendant was bound to provide suitable and safe accommodations for the landing of passengers. The rule of the strictest diligence in this respect is the only one consistent with a due regard to the value of human life and with the relation which the defendant assumes to the public. But the rule does not impose upon the defendant the duty of so providing for the safety of passengers, that they shall encounter no possible danger, and meet with no casualty, in the use of the appliances provided by it. It was possible for the defendant so to have constructed the guard, that such an accident as this could not have happened; and this, so far as appears, could have been done without unreasonable expense or trouble. If the defendant ought to have foreseen that such an accident might happen, or if such an accident could reasonably have been anticipated, the omission to provide against it would be actionable negligence. But the facts rebut any inference of negligence on this ground. The company had the experience of years, certifying to the sufficiency of the guard. That it was possible for a child or even a man to get through the opening was apparent enough. But that this was likely to occur was negatived by the fact that multitudes of persons had passed over the bridge without the occurrence of such a casualty. If the structure was intrinsically insecure, the fact that it had been used without injury before this would not exempt the company from responsibility,

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when an accident did happen from its defective condition. The guard was concededly sufficient for grown people. A small child might more easily get through the opening than a man, but small children are usually in charge of parents or guardians; and this is entitled to some weight in determining the question of the company's negligence. We think the exemption of the defendant in this case rests upon the fact which we think clearly appears as an inference from the other facts, that the company had no reason to apprehend an accident like this, and that the arrangements made were such as experience had up to that time shown to be safe and suitable, and sufficient to meet the requirements of its duty. The line which separates a pure misadventure resulting in injury, for which no one is responsible, from accidents creating responsibility, by reason of negligence, is often narrow and difficult to be drawn; but we think the casualty in this case is of the former and not of the latter class. It results from these views that the defendant was not liable, and that the verdict was properly set aside. The order of the General Term should be affirmed and judgment absolute ordered for the defendant on the stipulation.

Order affirmed and judgment accordingly.

All concur, except RAPALLO, J., absent.

NOTE BY THE REPORTER.—See *Garin v. City of Chicago*, 97 Ill. 66; a. c., 37 Am. Rep. 81. In *Dougan v. Champlain Transp. Co.*, 56 N. Y. 1, D., plaintiff's intestate, was a passenger upon defendant's boat on Lake Champlain. The forward deck was surrounded by bulwarks three or four feet high, with gangways upon each side closed by rails hinged to the bulwarks and of the same height, and coming down upon the stanchions in the center of the gangway, leaving the space beneath open. This deck was not designed for passengers, but they were permitted to come upon it with knowledge of defendant's employees. D. came out thereon, his hat blew off, he sprang to recover it, slipped under the gangway rail, fell overboard and was drowned. It appeared that all the boats upon the lake were constructed in the same manner; that they had been so run for many years, and there was no proof tending to show that any one had ever before gone overboard in this way, or that such danger had been apprehended. *Held*, that the evidence failed to show negligence on the part of defendant, and that plaintiff was properly nonsuited. The court said: "Had there been any proof tending to show that any such danger would be apprehended by a reasonable, prudent person, the evidence should have been submitted to the jury; but the evidence showed that all the passenger boats upon the lake had been constructed and run in the same way in this respect: that boats had so been run for a great number of years; and there was no proof tending to show that any one had ever before fallen and gone overboard under the railing, or that any such danger had been apprehended by any one. It is obvious that no such thing was likely to occur. Indeed a man would be much more likely to get overboard by falling over than under the railing. True, it would be unsafe for small children to run upon this part of the boat, as they might run under the rail and fall overboard; but there was no evidence that children were ever permitted to be in this part of the boat, except to go on and off in port; there was nothing showing that any passengers were ever expected to be there except for this purpose. The counsel for the appellant cites cases where it has been held that carriers of pas-

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passengers are required to exercise the utmost care in their vehicles, machinery, etc., used in their transportation, and that for this purpose they are required to use all the safeguards furnished by science generally known; but these were cases of the explosion of steam boilers, the breaking of axles of railway coaches, defects in railway tracks and the like, where experience had shown that danger was to be apprehended and necessary to be guarded against. But when, as in the present case, numerous boats constructed in the same way had been run for years with perfect safety to the passengers, where there was no ground for supposing that any passenger ever permitted to be there would fall under the railing, to find negligence from a failure to board up the space so as to preclude such a possibility could not be justified."

In *Crocheron v. North Shore Staten Island Ferry Co.*, 56 N. Y. 656, plaintiff was a passenger upon one of defendant's boats. Upon each step of the main stairway of the boat was put a brass plate or covering, which was corrugated, save where it turned over the edge of the step; this was left smooth and slippery. Plaintiff's evidence tended to show that she slipped on the edge of the step, as she was passing down the stairway to leave the boat, and was injured. The placing of this plate upon the stair was the alleged negligence. The stairs were finished in the same manner as upon the best river boats, and upon American sea-going steamers. The boat had been in use for a year and had carried, on an average, a thousand passengers a day; no injury of the kind had before occurred. Several experienced men testified that this mode of covering stairs was the best in use. Held, that the evidence failed to show negligence, and that a refusal to nonsuit plaintiff was error.

In *Cleveland v. N. J. Steamboat Co.*, 68 N. Y. 306, plaintiff went on board one of defendant's boats at New York to take passage to A. He stood in front of the gangway opening, inside the bulwarks, but outside of the main part of the boat. Defendant had provided means and appliances sufficient to protect the gangway, *i. e.*, a gate supported by stanchions, with a top rail, etc. The top bar of the gate projected at each end, which, when the gate was in place, rested in iron staples, sufficient to hold the gate in place unless it was broken. The mate had put the gate in place, and as the boat started, was in the act of taking the stanchions and top rail to put them in their proper place, when a person on board, in attempting to jump ashore, fell into the water. This caused a rush of passengers to the side, who pushed plaintiff against the gate. One end of this had been lifted out of the staples by some unauthorized person. The gate gave way and plaintiff fell overboard and was injured. In action to recover damages, held, that plaintiff's position near the gangway opening was not such as to charge him with contributory negligence as matter of law; but that the evidence failed to show negligence on the part of defendant, and that a refusal to nonsuit was an error. The court said: "We see no facts in proof, from which it can be said that such an occurrence was reasonably to be anticipated, or that it was or should have been contemplated by the defendant, as in the nature of things likely to occur. Experience had not shown that danger was to be apprehended from this source, and that it was necessary to be guarded against."

McCONNELL V. SHERWOOD.

(84 N. Y. 522.)

Assignment for benefit of creditors — authority to compromise.

A general assignment for the benefit of creditors authorized the assignee to "collect the notes, accounts, and choses in action, and the taking a part of the whole when" the assignee "shall deem it expedient." Also, "to com-

promise with the creditors * * * for all his debts and liabilities * *
 * if in his opinion * * * it would be advantageous to the" assignor
 and the creditors. Held that the first clause did not invalidate the assign-
 ment, but that the second did. (*See note, p. 542.*)

ACTION against sheriff for conversion. The opinion states the case. The plaintiff had a verdict, which was reversed at General Term.

M. Rumsey Miller, for appellant.

J. F. Parkhurst, for respondent.

DANFORTH, J. Where, upon the face of an assignment or by proof *aliunde*, it appears to have been made with intent to hinder or delay creditors, it affords no protection to the assignee against a sheriff who seeks to enforce by execution a judgment against the debtor. This rule was applied at the Circuit and the General Term, but with different result. The trial judge held the instrument valid upon its face, and the jury found that it was made in good faith and without intention to hinder or defraud the creditors of the assignor. The General Term so construed its provisions as to imply an illegal purpose, and the correctness of this conclusion is the question here. It turns upon certain language in the habendum clause, where after describing the property, the assignor declares the conveyance to be in trust; first, to sell and dispose of his personal property and estate and "collect the notes, accounts and choses in action, and the taking a part of the whole when the party of the second part" (the assignee) "shall deem it expedient to so do;" and second, prescribes the distribution and payment of the proceeds to all the creditors of the assignor for all debts and liabilities which he may be owing, or if insufficient for that purpose, "in proportion to their respective demands," but further declares that the assignee "may have the right to compromise with" those creditors, if in his opinion "it would be advantageous" to them and to the assignor. Upon these provisions the contention hinges.

The first condition, taken literally, means only that the assignee may receive payment by installments or from time to time. He is to collect the notes, etc., but he may take a "part of the whole when he deems it expedient to do so." There is no direction to compromise, none to make abatement, none to give a discharge of the whole on receiving a part. It is not that a part may be taken

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for the whole, but of the whole. A debtor cannot insist on paying his debt by portions, nor is a creditor required to receive it in that manner. Nor is payment and acceptance of a part satisfaction of the debt. The clause in question confers authority to receive fractional payments, but none to give satisfaction. If there is doubt as to its meaning, it should be solved in such a manner as to uphold rather than destroy the instrument. It was construed at General Term however and by the respondent here, as if it conferred upon the assignee power to compromise or compound debts due the assignor by accepting part for the whole. This is not expressed, but if such is the effect, it would be no stronger than the case made in *Coyne v. Weaver*, 84 N. Y. 386, where to similar words was added an express "right to compound for the said chose in action," and yet the assignment was upheld. Therefore the provision in question does not taint the assignment.

A different result follows from the clause, permitting the assignee to compromise with the creditors of the assignor. To that must be applied the rule declared in *Grover v. Wakeman*, 4 Pai. 23; 11 Wend. 187; 25 Am. Dec. 624, and adopted in many later cases, either in words or effect, as the only safe one, and which regards every assignment operating to delay creditors, for any reason not distinctly calculated to promote their interests, as contrary to the Statute of Frauds and therefore void. But within that limitation a failing debtor may however uselessly amplify the words which transfer his estate, and appropriate it to the payment of his debts; for although he may thus excite suspicion and provoke litigation, and so bring his deed to judgment, they will not, unless inconsistent with the rights of creditors, invalidate his act. And first, it is in favor of this instrument that it provides for a surrender of all the debtor's property and its equal division. Such is the desire of the assignor, as expressed in words: "To convey all his property for the benefit of all his creditors, without any preference or priority." These are the premises. The declaration of trust, or direction for distribution of the proceeds of this property, is in furtherance of this desire. It goes to all creditors, for all debts; and if not enough to pay in full, then *pro rata*. These are valid provisions, and if the assignor had gone no further, the object of the trust would have been carried out as one to the advantage of the beneficiaries. The debtor would have given up all that he had, to be applied without reserve to the payment of his debts. But

then comes the succeeding clause, and this we cannot help seeing is a provision which at once nullifies all that has been commended. Without this it is such an instrument as is favorably regarded by a court of equity. With it the assignment comes within the principle of many cases where trusts have been "subverted as illegal," because the assignee was invested with some absolute or discretionary power beyond the direct appropriation of the assets to the payment of debts; or the assignor reserved to himself a power over the future direction of the trust fund, or an interest in it, to be taken care of for him by the assignee. If the assignment is valid, the trust to compromise is to be observed and regarded by the courts, and delay for that purpose in the disposition of the property or the distribution of the avails could be justified by the assignee, although required by a creditor to hasten the conversion of assets or pay over its avails. So too in negotiation for or arranging a compromise, the interest of the debtor is to be regarded and kept in view by the assignee, for it is permitted only when in his opinion such proceeding would be advantageous to the assignor. It therefore cannot be said that the assignor has devoted his property absolutely and unconditionally to the payment of his debts. If under the preceding clauses a creditor should insist that the assignor had so directed, the assignee could say there is also given an express power to compromise, *i. e.*, procure concessions from creditors, before parting with the property. If all the creditors should say, we will compromise; give us the whole property, and we will discharge the debts, the assignee could say, that would not be advantageous to the assignor, and in either case could uphold his conduct by the very words of the instrument. But suppose the assignment did not contain this clause. The assignee could neither delay the execution of the assignment by an effort to compromise, nor consider the interest of the assignor in determining the time or manner of the execution of his trust. As it is, while placing his property beyond the reach of process, the assignor retains an interest to be provided for, delays its application to the payment of his debts by investing his trustee with power which requires time for its execution, and then prohibits its exercise, unless it is advantageous to himself. I am inclined to construe this clause as requiring a compromise if at all, with all the creditors, not permitting it with any one, or any number less than all; but this does not meet the difficulty. There is the power to compromise; and this must be construed in the

sense of compound, or to discharge the debts by paying only a part ; its accomplishment requires the consent of the creditors and the assignee ; a payment of part by the assignee and a discharge upon its acceptance by the creditors. The imposition then of terms and conditions, and in devising these the interest or advantage of the debtor must be considered. This is a plain departure from the power to convert and the duty to pay over the proceeds of the property when converted, without regard to the debtor, and with no inquiry save as to the existence of the debt and its amount. It is said that this compromise cannot be made unless each creditor consents ; neither can it unless the assignee consents for the assignor, that is, deems it for his advantage also. But without this there may be delay justified ; an effort to make a compromise would require it ; and until it had been tried, if the assignee saw fit to make the effort, the court could not require him to act under the other trusts. The legal duty of the assignee under a valid trust is as plain and simple as that of an officer holding an attachment or charged with the duty of enforcing judgment by execution. However great the apparent sacrifice, and however disadvantageous to the debtor, the law permits no wish or interest of his to come between the creditor and the satisfaction of his debt, and it requires from the appointee of the debtor equal celerity and the same indifference. Here compromise or an attempt at compromise may precede payment, and with either is delay. It seems evident therefore that the intent was to delay the payment of the debts and create a trust for the use of the assignor ; and either of these intents, both by the common law and the statute (2 R. S. 135, § 1 ; id. 137, § 1), is a fraud, in face of which the assignment cannot stand.

The cases, cited by the appellant's counsel and referred to in his interesting and impressive argument, raise no doubt as to the necessity of this conclusion. *Jewett v. Woodward*, 1 Edw. Ch. 195, was most insisted upon. But there the question did not arise. The assignment was not attacked, but acquiesced in, and the bill was filed against the assignees for an account and payment of the money to which the creditors were entitled under it. *Hone v. Henriquez*, 13 Wend. 240 ; 27 Am. Dec. 204, where it was held that one who had become a party to the assignment by a formal assent thereto could not be heard to say that it was void ; and so doubtless an assignment, however objectionable, if executed by consent of all the creditors, would be deemed valid and not void. But neither these cases, nor the

reasons on which they stand, aid the plaintiff. The creditors did not consent, and one objection to the assignment is that under its provisions the assignee could delay the execution of the other trusts until he ascertained whether they would compromise. Power to compromise restrains the creditors until the attempt is made. Thus they would be hindered, and a delay in the conversion of property or the payment of debts, even for a single day, would be fatal to the assignment; and whether the delay is directed by the instrument, or justified by its provisions, or made necessary for their execution — except so far as that delay is incident to the conversion of assets and payment of debts — can make no difference. *Nicholson v. Leavitt*, 6 N. Y. 510; *Brigham v. Tillinghast*, 13 id. 215. This illegal delay is provided for by the clause in question.

It is also urged by the appellant that the jury found by their verdict "that the assignment was not made by the assignor with the intent or for the purpose of coercing creditors into compromising the debts he owed them." This is so. But it was after the court had held the clause in question did not vitiate the assignment, and under a charge that it was not evidence of an attempt on the part of the assignor to coerce them. It was withdrawn from their consideration.

We think the learned trial judge erred in his construction of this clause of the assignment, and that the judgment given upon the verdict was properly reversed by the General Term. The order of that court should therefore be affirmed and judgment absolute rendered for the defendant, according to the stipulation upon which this appeal was taken.

Order affirmed, and judgment accordingly.

All concur, except RAPALLO, J., absent.

NOTE BY THE REPORTER.—In *Coyne v. Weaver*, 84 N. Y. 386, the court said: "The instrument contains a general grant and conveyance of all the property and choses in action of the assignor, and empowers the assignee 'to sell and dispose of the said real and personal estate, and to collect the said choses in action, with the right to compound for the said choses in action, taking a part for the whole, when he shall deem it expedient.' A literal and rigid construction of this language would justify the claim of the appellant that authority was given to compromise all debts due the assignor, as well those which were good for their entire amount, as those which were doubtful and precarious. If we were compelled to accept this interpretation, it would be our duty to declare the instrument void, for it would be an authority to waste the fund. But we are satisfied that it is not our duty to adopt this construction. It is difficult to conceive of any fraudulent motive or purpose on the part of the assignor which would be aided by such authority. The consequent loss would be injurious to the assignor, and in no possible respect an advantage. The waste permitted would tend only to increase the balance of uncanceled debt

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remaining to hamper his action after the close of the trust. As sought to be construed, it is literally an authority to waste the assets devoted by the assignor to the payment of his debts. Acted upon, it could only injure both the creditors and the assignor and by no possibility benefit either. We should not accept such an interpretation unless compelled by plain and inflexible provisions. Two rules should guide us to the proper result. The meaning and intention of the assignor is to be gathered from the whole instrument, and where two different constructions are possible, that is to be chosen which upholds and does not destroy the instrument. *Townsend v. Stearns*, 32 N. Y. 209; *Brainerd v. Dunsing*, 30 id. 211; *Campbell v. Woodworth*, 24 id. 304; *Benedict v. Huntington*, 32 id. 319. It must be granted that the authority to compromise, given by the clause under consideration, relates by its terms to the choses in action generally transferred to the assignee. So far no distinction is made between the good and the doubtful assets. But the important words 'where he shall deem it expedient to do so' qualify the general authority and limit it to either one or the other of two possible cases, according to our choice of one or the other of two possible constructions. Those qualifying words may mean, either that the assignee is at liberty to compromise any claim if he shall choose to do so, and behind his judgment nobody shall go, or that the assignee may compromise such claims as in the exercise of a sound discretion the interests of the trust require. We think the latter is the plain and proper construction. If it was necessary, in order to reach that interpretation, to be subtle and astute in our study of the language used, the quaint expression of Lord HOBART, cited with approval in *Townsend v. Stearns*, 32 N. Y. 215, would furnish our justification. A court may wrestle, if need be, with unwilling words to find the truth, or preserve a right which is endangered. But any strain upon the language of the assignment is not necessary to our conclusion. We may so test the final and important phrase as to be certain of its meaning. Let us suppose that the assignee, acting under the authority we are discussing, had compromised a debt due the assignor by accepting one-half its amount, in a case where the debtor was perfectly good, and the whole sum could have been collected. Let us further suppose that on his accounting, the assignee admitting all these facts, gave no other explanation than to plant himself upon the words of his authority, and declared that he was empowered to compromise where he deemed it expedient, and he did deem the compromise in question expedient, and therefore was entitled to protection. Is it to be presumed that any court would accept his construction of the authority conferred? The just and proper answer would be that he overestimated and misconstrued his power; that while he was given a discretion, it was the discretion of a trustee, exercised in a proper case, under circumstances requiring it, and founded upon a just consideration of the needs of the fund committed to his care. The clause in question therefore must be held to have given to the assignee no arbitrary power to compromise where such action was neither necessary nor proper; but merely the discretion which the law recognizes, to compromise doubtful and dangerous debts, in cases where the safety and interest of the fund demands such action; and that in such case only can he honestly 'deem' a compromise 'expedient,' or be allowed to plead that authority as a protection. Thus understood, the language of the assignment is not open to the criticism bestowed upon it. It confers upon the assignee no unlawful or arbitrary power, and takes away from the creditors no just protection. It leaves the assignee liable for his negligence and misconduct if he makes a compromise where prudence or necessity do not require it, and the assignment therefore is not void. *Dow v. Platner*, 16 N. Y. 553; *King v. Talbot*, 40 id. 76; *Chouteau v. Suydam*, 21 id. 179; *Ginther v. Richmond*, 18 Hun, 284."

HUNTER V. WETSELL.

(84 N. Y. 549.)

Statute of frauds—sale of goods—payment—time of.

Parties made an oral contract for the sale of goods, void under the statute of frauds. Subsequently the purchaser gave and the seller accepted a check for a part of the price. At that time the essential terms of the original contract were restated. The check was good when delivered, and was duly paid. *Held*, a payment, and "at the time" of the contract.

ACTION for the price of goods. The opinion and head-note show the facts. The plaintiff had judgment below.

J. H. Clute, for appellants.

E. W. Paige, for respondents.

FINCH, J. We are to assume as facts in this case, from the verdict of the jury, that an absolute contract for the sale of the hops, after they were weighed and baled, was entered into verbally by the parties, by the terms of which the hops were to be delivered where the defendants determined and requested, and were to be paid for within a few weeks upon such delivery, at the rate of fifty cents per pound, with \$10 additional on the whole lot. Since the quantity of the hops, as baled and weighed, carried the price beyond \$50, we held upon a previous appeal that the contract was void within the statute of frauds, because no memorandum in writing was made, no part of the property delivered, and no portion of the purchase-money paid at the time of the transaction. The after-payments of \$300 we decided to be insufficient to validate the contract, because when made there was no restatement or recognition of the essential terms of the contract. 57 N. Y. 375; s. c., 15 Am. Rep. 508. In the case as now presented, the difficulty, fatal before, is claimed to have been obviated. There is proof of a restatement of the essential terms of the contract at the time of the delivery of the check for \$200. There is proof also contradicting such alleged fact. The question was left to the jury, under a charge from the court which does not seem to be the subject of complaint, and they in rendering a verdict for the plaintiffs neo-

essarily found the fact of such restatement. That finding is conclusive upon us.

But it is now objected, that conceding the fact of such restatement, there was no payment of any part of the purchase-money at that time. It is admitted that the check was then given, and it cannot be successfully denied that it was both delivered and received as a payment upon the contract-price of the hops, but it is claimed that the check was not, in and of itself, payment, and having been drawn upon a bank, could not have been in fact paid until afterward, and so there was no payment "at the time" to satisfy the requirements of the statute. It is quite true that a check, in and of itself, is not payment, but it may become so when accepted as such and in due course actually paid. While not money, it is a thing of value, and is money's worth when drawn against an existing deposit which remains until the check is presented. We must assume that the check of the vendee, in this case, was good when drawn and was duly paid upon presentation in the usual and regular way, for it appears in the possession of the drawers, and they practically assert the fact of its payment by their counter-claim in the action, by which they seek to recover back the money so paid. There was therefore an actual and real payment made by the vendees to the vendor, upon the purchase-price of the hops. It is said however that the actual payment of the money, as distinguished from the delivery of the check, was not "at the time" of the contract, but at some later period. We do not know accurately when the check was paid. It may have been the same day. It may have been within a very few moments. It may not have been till the next day. We are not to presume, for the purpose of making the contract invalid, that it was held beyond the natural and ordinary time. In such event it is a very narrow construction to say that the payment was not made at the time of the contract. The purpose and object of the statute should not be forgotten. Its aim is to substitute some act for mere words, to compel the verbal contract to be accompanied by some fact not likely to be mistaken, and so avoid the dangers of treacherous memory or downright perjury. The delivery of the check was such an act. Indeed, it would be an entirely reasonable and just construction to say that the delivery of the check and its presentment and payment constituted one continuous transaction, and should be taken as such without reference to the ordinary delay attendant upon turning the

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check into money. The statute does not mean rigorously, *instanti*. It does contemplate that the contract and the payment shall be at the same time, in the sense that they constitute parts of one and the same continuous transaction. We think therefore there was a payment "at the time," within the meaning of the statute, and that the contract of sale was valid. *Artcher v. Zeh*, 5 Hill, 200; *Hawley v. Keeler*, 53 N. Y. 114; *Bissel v. Balcom*, 39 id. 275.

[Omitting minor questions.]

We discover therefore no error committed on the trial of this case and the judgment should be affirmed, with costs.

Judgment affirmed.

All concur, except DANFORTH, J., dissenting, and RAPALLO, J., absent. FOLGER, C. J., concurring in result.

CASES

IN THE

SUPREME COURT

OF

OHIO.

BRADLEY V. BAUDER.

(25 Ohio St. 22.)

Taxation — foreign stock — constitutionality.

Stock in a foreign corporation may lawfully be taxed to the resident owner, although the capital of such corporation is taxed where it is located.

ACTION to enjoin the listing of property for taxation. The opinion states the point. The injunction issued below.

R. P. Ranney, for plaintiffs.

Marvin, Laird & Cadwell and *Grannis & Griswold*, for defendant.

BOYNTON, J. The sole question arising upon the demurrer to the petition is whether the shares of stock in corporations created in other States, which shares are owned by persons residing here, are taxable under our Constitution and laws, where the capital stock of the corporation is invested in real and fixed property

situated in the State in which the corporation exists, and where by the laws of such State the same is required to be listed for taxation.

The claim of the learned counsel for the plaintiffs is that the right, in such case, to levy and collect a tax upon the shares of stock of such owner, finds no warrant either in the Constitution or the statute.

The constitutional power to tax shares of stock in foreign companies, owned by residents of Ohio, was directly involved in *Worthington v. Sebastian*, 25 Ohio St. 1, where it was held, that the duty imposed by the statute to tax such shares was neither in violation of the Constitution of the State, nor of the United States.

The question arose under the act of 1859 (2 S. & C. 1438); but the provisions of that act, in respect to property made subject to taxation, were substantially the same as those of the act of 1878, under which the right in the present case is asserted to tax the shares of the plaintiffs in foreign companies.

The two acts being the same as respects the property subject to taxation, it follows that if that case was correctly determined, it is decisive of the present. A careful examination of the grounds on which it rests satisfies us that the same was correctly decided.

[Omitting a statutory consideration.]

But it is said, that because the capital of the company is invested in real and fixed property in the State where the corporation is located, and in which State, taxes upon the same are regularly levied and paid, a tax here upon the shares of stock of those residing here, is a tax upon the same property, and therefore results in double taxation.

The argument is, that the capital of the corporation is invested in property which is taxed in the name of the corporation, and that the shares in the capital stock, when owned by individuals, only represent proportions in the ownership of such property and hence to tax the shares is another mode of taxing the property of the corporation, and that a tax upon both, although the tax upon one is imposed by another State violates the rule or principle of equality established by the Constitution. This argument, however plausible it seems, has never met with favor from the courts. Double taxation in a legal sense does not exist unless the double tax is levied upon the same property within the same jurisdiction. Here the property owned by the plaintiffs is not only the same as

that owned by the corporation, but its *situs*, so far as shares of stock are capable of one, is in a different State.

The capital of a corporation, whatever invested in, and the individual shares of stock, are distinct species of property. *Farrington v. Tennessee*, 95 U. S. 679. The owner of a share of stock owns no part of the capital of the company. *Watson v. Spratley*, 10 Exch. 236. The corporation is its sole owner, holding the same, it is true, in trust for the purposes for which the corporation was created, and upon its winding up for the benefit of creditors and shareholders. The ownership of a share of stock, so far as the property of the corporation is concerned, is but the ownership of the right to participate from time to time in the net profits of the business, and upon the dissolution of the corporation to a proportion of the assets after the payment of the corporate debts. It is personal property which upon the death of the owner goes to his administrator, although the entire capital of the corporation may consist of real estate. The owner may sell or dispose of his stock at pleasure, and in so doing works no change or modification in the title to the corporate property. From this it would seem to result necessarily that its *situs*, for purposes of taxation, when not otherwise provided by statute, is that of the domicile of the owner. That shares of stock may be separated from the person of the owner, by statute, and given a *situs* of their own, was held in *Tappan v. Merchants' National Bank*, 19 Wall. 490. But when not separated, that their *situs* follows and adheres to the domicile of the owner, is supported by a great weight of authority. *State v. Branin*, 3 Zab. 484; *Newark City Bank v. Assessor*, 30 N. J. 13; *Great Barrington v. County Com'rs*, 16 Pick. 572; *Oliver v. Washington Mills*, 11 Allen, 268; *Whitesell v. County of Northampton*, 49 Penn. St. 526; *Cooley on Taxation*, 16; *Burroughs on Taxation*, 188.

The same principle governs a chose in action; for purposes of taxation, its *situs* is that of the domicile of the owner, although the debt is secured by a mortgage upon realty in another State, and by agreement of the parties expressly made subject to its laws. *Kirtland v. Hotchkiss*, 42 Conn. 426; s. c., 19 Am. Rep. 546. See same case in 100 U. S. 491.

The constitutional power to tax shares of stock, owned by our citizens in corporations located without the State, does not depend on whether the capital of the corporation is or is not taxed in the State where the corporation is created. The power is the same,

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whether the capital of the corporation is there taxed or not ; otherwise the power of taxation conferred by the Constitution would be made to depend upon the operation of laws of a foreign jurisdiction — a proposition so obviously ill founded that the moment it is stated its falsity becomes apparent.

In *Dwight v. Mayor*, 12 Allen, 316, the plaintiff, the owner of shares in a foreign railroad corporation, sought a deduction from the tax upon his stock, by reason of the tax on the property of the corporation in the State where the same was located. The right to such deduction was denied, the court remarking that "shares in a foreign railroad corporation held by citizens of this State are fully taxed here, and no deduction is made for any taxation to which the corporation is subject, in the States where they are located. So it is in regard to shares held by our citizens in banks, insurance companies and other moneyed corporations, situated in other States. Such shares when held by our citizens, are here treated as so much personal estate, following the person of the owner, and taxable at their full value in this Commonwealth, regardless of what may be the foreign law as to taxation of the capital or any part of it elsewhere."

This case is but one of a great number that hold the same doctrine.

The demurrer is sustained, the injunction vacated, and petition dismissed.

So ordered.

RICHARDS v. DOYLE.

(36 Ohio St. 37.)

Marriage — coverture — specific performance.

Where two, one of whom is a married woman, covenant to convey real estate which they jointly own, the purchaser cannot set up the coverture in avoidance of his covenant to purchase, when the other party is competent and willing and offers to perform.

ACTION for specific performance of an agreement for sale and purchase of real estate between Margaret Morgan and Sophia Jones, of one part, and Samuel Doyle, of the other. The opinion states the facts. The defendant had judgment below.

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C. N. Olds and Harrison & Olds, for plaintiffs in error.

Lorenzo English and J. W. Baldwin, for defendants.

MCILVAINE, C. J. The general proposition, that courts of equity will not enforce the specific performance of an executory contract of a married woman, either for or against her, may be admitted. The general rule undoubtedly is, that the obligation of a contract must be reciprocal and mutual between the parties in order to entitle either to a decree for specific performance against the other party; and a married woman, as a general rule, not having capacity to bind herself to the performance of an executory contract, the party assuming to contract with her, is not, in law or in equity, obliged to perform such contract on his part.

To what extent, or under what circumstances, however, performance or part performance of a contract by a *feme covert* will raise such an equity in her favor that specific performance will be decreed to her, is not so clearly settled. It would seem safe however on the authorities, to say, that when a *feme covert*, in the performance of her contract, has so changed her condition that the rescission of the contract would not place her in *statu quo*, and the other contracting party is tendered full performance, or can be made secure in the benefits of his contract, equity will not allow him to say that he is not bound to perform on his part.

While we are inclined to think, that upon the principle here suggested, the plaintiffs below were entitled to a decree in their favor, there is another view of the case which clearly shows that the courts below erred in refusing to grant the relief prayed for. Mrs. Morgan, one of the contracting parties, most clearly was bound to Doyle to convey to him the whole of the premises contracted for, upon the performance of the conditions named in the contract, and upon failure to do so, would have been liable for damages resulting from such breach of her contract. It would have been no defense for her or her representatives to have shown that the title to the whole of the lot was not in her, but that a part interest was in Mrs. Richards, who did not promise to convey, and that another interest was in Mrs. Jones, who by reason of her coverture was not bound by her contract to convey. That Mrs. Morgan could have been compelled to convey to the extent that the title was in her or under her control is not a matter of dispute, and for so much of the estate

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as she was unable to convey or procure to be conveyed she would have been liable to make compensation. As between Mrs. Morgan and Doyle, the purchaser, the contract did not lack either mutuality or consideration. Hence, when it was shown in the court below that the representative of Mrs. Morgan was able, willing and ready to transfer or to have others transfer to the purchaser the whole estate for which he had contracted, he should have been decreed to pay the purchase-money. That Mrs. Richards, and Mrs. Jones with her husband, were demanding the same relief, did not prejudice the purchaser. His right was to have the title for which he had contracted, his duty was to pay the purchase-money. All the parties in interest were before the court, and would have been concluded by the decree. A decree for specific performance against the purchaser would have done ample and complete justice. The denial of such decree left the vendors without adequate remedy.

Judgments of the District Court and of the Common Pleas reversed, and decree for plaintiffs.

PATRICK V. LITTELL.

(36 Ohio St. 79.)

Marriage—contract of married woman for loan secured by mortgage on her estate—public policy.

To effect a loan to remove a mortgage from her separate real estate, a married woman agreed in writing to execute a warranty deed thereof in fee and to accept a lease for ten years, with privilege of redemption at the end of the term, and agreed to pay a ground rent equal to eight per cent per annum on the amount loaned, and all taxes and assessments during the term. The purpose of the lender was to evade taxation as upon the mortgage. The married woman also agreed to pay an attorney for his services in procuring the loan in that form. *Held* (1) that the security was taxable as an equitable mortgage; * (2) that the agreement to pay for the services was not contrary to public policy; (3) that the agreement was binding as for the benefit of the separate estate.

ACTION for services. The head-note and opinion state the facts. The plaintiff had judgment below.

* To same effect, *Phelps v. Bellows' Estate*, 55 Vt. 529.

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Matthews, Ramsey & Matthews, for plaintiff in error.*J. R. Murdock*, for defendant in error.

BOYNTON, J. The plaintiff in error contends that the judgment of the Special Term of the Superior Court against her is erroneous for two reasons.

First, that being a married woman when her liability is alleged to have been incurred, and not having charged her separate estate with the performance of her engagement or obligation to pay the defendants for the services rendered in her behalf, or for the money advanced for her, a personal judgment was wholly unauthorized; and secondly, that inasmuch as the transaction contemplated that the security for the loan should assume the form of an absolute conveyance, with a lease back for ten years, with a right of redemption at the end of the term, instead of an ordinary mortgage, the purpose being to evade the revenue laws of the State by so covering up the loan as to conceal the real character of the transaction, the engagement or obligation was void as against public policy. As respects this objection, whatever might be the effect of the transaction, if the person from whom the money had been procured were seeking to enforce the provisions of the agreement, — with which point we are not now concerned, — the relation of the defendants in error to the transaction, or to the form of security to be given for the money borrowed, was not such, in our judgment, as to defeat their right to compensation for the services rendered, or the money advanced. They were constituted agents to procure a loan, upon terms prescribed by the plaintiff and her husband. The written request to procure the same explicitly defined the form of the security the defendants were directed to adopt. It was in pursuance of these directions that the services were rendered and the money paid for the examination of the title to the property, which was to be pledged as security for the debt. The agreement by the defendants was fully executed, and the services rendered were performed in good faith. To refuse them redress, under the circumstances, for the reason stated, would, it seems to us, be applying the doctrine which denies a remedy for the enforcement of contracts contrary to public policy, to a state of facts not justly falling within the operation of the rule. The services they performed were distinctive in their character and perfectly lawful; and had the transaction been

executed throughout in the mode contemplated by the parties, as respects the form of the security to be taken, it would, in fact and legal effect, have been but a loan secured by what in equity would have been regarded as a mortgage only, and the investment, without doubt, have been as much the subject of taxation under the statute relating to that subject, as if a mortgage pure and simple had been taken.

Where the transaction, within the understanding of the parties, is a loan of money upon security, no form which the transaction may assume can so disguise it, as to change its legal character or effect.

It remains to consider the effect of the coverture of the plaintiff upon the obligation she assumed, and upon the right to give a personal judgment against her. The facts are briefly these. Being the owner of a separate estate, which was heavily incumbered by mortgage, she engaged the defendants in error, her husband joining, to secure for her a loan of \$10,000 to enable her to remove the mortgage from her estate. She agreed to pay an attorney's fee for making an examination of her title, and a commission of \$100 to the defendants for securing the loan. The services stipulated for were fully performed, the defendants paying \$50 from their own funds to the attorney making the abstract of title. The plaintiff refused to accept the loan, or to pay for the services rendered in procuring it. We have no hesitancy in pronouncing the agreement made, to be one, not only having direct reference to Mrs. Patrick's separate estate, but made for its benefit. The object was to remove an existing incumbrance upon the property, and it was to accomplish this object that the services of the defendants were engaged. The fact that the loan was to be secured by a new mortgage upon the same property, affects the question but very little. She was to get rid of a mortgage debt then due and pressing, by substituting another therefor, to become due ten years thereafter.

Whether the separate estate would in fact be benefited by exchanging one mortgage for another, is not the test of liability. A married woman, to the extent of her power of disposition over her separate estate, may charge it with such engagements as she sees fit to make. If subjected to no imposition, a fact always to be determined in view of the relation she sustains to the parties to the transaction, in connection with its nature and subject-matter, she may charge the property to the extent she might bind herself at law, were she sui

juris, unless in so doing she exceeds some limitation upon her power of disposition. Pollock on Cont. 73. And that there is now no limitation upon her power to bind her estate to the discharge of liabilities created on account thereof, where the estate is acquired under the statute, will be shown hereafter.

The question now is, whether an intention upon the part of Mrs. Patrick, to charge her separate estate with payment for the services rendered, and money paid by defendants, for the benefit of such estate, will be implied from the character of the transaction and the nature of the engagement entered into. The principles announced in previous adjudications of this court require an affirmative answer to this question.

In *Phillips v. Graves*, 20 Ohio St. 371, it appeared that Mrs. Graves, owning a separate estate, had purchased a piano, and given her note therefor, and that the same was purchased for her separate use, and as her separate property. The court held that an intention to charge her separate estate with the payment of the note might be inferred from its execution. In *Avery v. Van Sickle*, 35 Ohio St. 270, it was held that where a married woman acquires the title to property by purchase, which by force of the statute becomes her separate estate, and executes a promissory note therefor, an implication arises, in the absence of proof showing a different understanding, that she thereby intended to charge her separate estate with its payment. And the circumstance that upon sale of the property so purchased, in proceedings in foreclosure, the proceeds were exhausted in the payment of prior liens thereon, did not affect the creditor's right to payment of the note out of the residue of her estate. So also in *Williams v. Urmston*, 35 Ohio St. 296 ; s. c., 35 id. 611, we held that where a married woman, having a separate estate, executes a promissory note as surety for another, a presumption arises that she thereby intended to charge such estate with its payment. The principle of the first two cases is clearly applicable to the present. The liability in each was incurred not only on account, but for the direct benefit of the estate, and was therefore held to be a just charge upon it. "The test of liability," says Mr. Pollock, "would seem on principle to be, whether the transaction out of which the demand arises had reference to, or was for the benefit of, the separate estate." Pollock on Contracts, 75.

Cases that deny the liability of the estate, where the wife becomes a surety, and does not expressly charge her estate with the pay-

ment of the debt, admit the liability where the engagement either has reference to the estate, or is for its benefit. *Yule v. Dederer*, 23 N. Y. 450; *Ballin v. Dillaye*, 37 id. 35; *Manhattan B. & M. Co. v. Thompson*, 58 id. 81; *Williard v. Eastham*, 15 Gray, 328.

It was said in a late English case, by Lord Justice JAMES, that "it would be very inconvenient that a married woman, with a large separate property, should not be able to employ a solicitor, or a surveyor, or a builder or tradesman, or hire laborers or servants, and very unjust if she did that they should have no remedy against such separate property." *London Chartered Bank of Australia v. Lempriere*, L. R. 4 P. C. 594.

Holding the separate estate of Mrs. Patrick liable to the defendant's demand, we are also of the opinion that a personal judgment against her was proper. Her obligation is one upon which were she sole she would be liable at law. It is a contract or obligation upon which, under section 28 of the Code, as amended March 30, 1874, she might have been sued alone; and being of that character, the statute requires the like judgment to be rendered and enforced in all respects, as if she were unmarried. 71 Ohio Laws, 47. It was one of the objects of this section as thus amended to so far modify the disabilities of coverture, as to authorize a personal judgment to be rendered against a married woman, where such judgment would have been proper, had she remained unmarried.

This provision, as amended, wrought a radical change in the remedy as respects the character of the judgment to be rendered, as did the amendment of April 18, 1870, as to the extent of the property that might be reached to discharge the liability. Prior to the date at which a personal judgment was authorized, the decree, according to the English practice, and that of some of the States, was directed against the estates, declaring the separate estate vested in the wife at the date of the decree which it was within her power to dispose of, chargeable with the payment of the debt. *Picard v. Hinc*, L. R., 5 Ch. App. 274; *Davies v. Jenkins*, L. R., 6 Ch. Div. 730; *Collett v. Dickenson*, L. R., 11 Ch. Div. 687; *Johnson v. Gallagher*, 3 De Gex, F. & J. 520; *Armstrong v. Ross*, 20 N. J. Eq. 109; see *Todd v. Lee*, 15 Wis. 365.

As there was no personal liability, no personal judgment could be awarded, and the decree only reached property which it was within the wife's power to bind. But under the statute as amended.

the same judgment is required, with the same process for its enforcement as would be awarded if the wife were sole; and saving to her such exemptions as are provided for heads of families, her separate estate is made liable for any judgment rendered against her, to the same extent as would be the property or estate of her husband, for any judgment rendered against him. This subjects all her separate property and estate acquired or held under the act of 1861, and its amendments, with the exception named, to the payment of the debts chargeable upon it; and also all separate estate otherwise acquired, unless restrictions are laid on her power to charge the same by the instrument creating the estate. Before the amendment of 1870 it is doubtful whether the creditor could have reached more than the personal estate of the wife, with the rents and profits of her real estate arising upon a lease for the term for which the wife could have leased the same without the consent of her husband. But now the creditors are substantially let in upon the whole estate, and where there are no liens to adjust, and the wife holds the legal title to the property constituting her separate estate—in other words, where there are no equitable circumstances calling for the exercise of the equity powers of the court—a personal judgment, to be collected by execution, would seem not only an appropriate remedy, but to be clearly authorized by the statute. The Married Woman's Property Act of England, of 1870, provided that "a husband shall not, by reason of any marriage which shall take place after this act shall come into operation, be liable for the debts of his wife contracted before marriage, but the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy such debts as if she had continued unmarried." In giving construction to this provision in *Ex parte Holland*, L. R., 9 Ch. App. 307, Lord CAIRNS said: "I think the meaning of the section is, that although the husband is not liable for the debts in question, the separate property of the wife is to be liable, and that for the purpose of reaching it she is to be subject to the ordinary process of law and equity." Section 28 of the Code, as amended in 1874, gives the same process, resort being had to the one that is appropriate to the case.

The objection, that it does not sufficiently appear that the plaintiff in error owns a separate estate, is not well founded. The petition alleges, and the fact is not denied, that the contract sued on related to her separate estate, and was made for its benefit. The contract

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related to no other property than that therein described, to which, it was alleged, she held the legal title. It thus appears that the property to which the agreement related was held by her for her separate use. Whether she had other property does not appear. Having a separate estate, the whole of it, subject to the exemptions provided for heads of families, was liable for the judgment.

Judgment affirmed.

 TRANSFER COMPANY V. KELLY.

(26 Ohio, St. 38.)

Negligence — concurrent — remedy.

Where a railway passenger sustains a personal injury by the directly concurrent negligence of the railway company and another, he may maintain an action therefor against the latter in spite of the concurrent negligence of the former.*

ACTION for personal injury sustained by the plaintiff, while riding in a street railway car, by collision with a wagon of the defendant. The opinion states the point. The plaintiff had judgment below.

Dodds & Wilson, for plaintiff in error.

Long, Kramer & Kramer, for defendant in error.

McILVAINE, C. J. The exact question presented by this record, as we understand the bill of exceptions, arises upon the fact assumed in the request to charge and in the charge as given to the jury, that the wrongful acts of the defendants below, the railroad company and the transfer company, were not only concurrent in point of time and place, but in such manner that the wrongful act of each was a direct and proximate cause of the injury complained of by the plaintiff; and this being so, it matters not whether the act of each, without the concurrence of the other, would have produced the injury, or that the negligence of neither would have caused it without such concurrence; so that upon general principles and reason both or either ought to make compensation therefor. The general

* See *Masterson v. N. Y. Cent. R. Co.*, ante, 510.

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rule undoubtedly is, that where damage is caused by the joint or concurrent wrongful acts of two or more persons, they may be prosecuted therefor jointly or severally. To this general rule of liability whether joint or several, there is an exception however based upon reasons as sound as is the rule itself, namely : that where the injured party, by his own negligence or wrongful act, contributes to his own injury, the law will not afford him a remedy against all or any of the persons whose wrongful acts, in connection with his own, produced the injury. But the case before us does not come within the exception above stated, for the reason that it is here admitted by the pleadings, that the plaintiff below was *in fact* without fault on his part. It is contended however by the plaintiff in error, that the plaintiff below was so identified with or related to the railroad company by the contract for carriage, that the fault of the carrier must be imputed to him as passenger.

The imputation thus contended for however is not based upon any alleged fault of the plaintiff below in entering into the contract for carriage with the railroad company ; for there is not even a suggestion that the contract was one which a reasonably prudent man would not have made ; but simply upon the ground that the plaintiff below was a passenger upon the car of the company at the time when an act of carelessness, contributing to his injury, was committed by one of the company's servants, namely, the driver of the car.

If the driver could, in any just sense, be regarded as the agent or servant of the passenger, or if the railroad company, whose servant the driver was, had been, under the contract, subject to the direction or control of the passenger, then with some show of reason it might be said that the passenger was responsible for the negligence of the driver.

But such was not the nature of the contract. The passenger was, it is true, entitled to a seat in the company's car ; but was not entitled to direct or control the time or manner of its movement. That the company was bound to exercise the highest degree of care to the end that the passenger might be safely carried, is true ; but it was not subject to the direction or control of the passenger, either as to employment of servants or as to the manner in which the service should be performed. It seems to us therefore that the negligence of the company or of its servants should not be imputed to the passenger, where such negligence contributes to his injury

jointly with the negligence of a third party, any more than it should be so imputed, where the negligence of the company or its servants was the sole cause of the injury. Indeed, it seems as incredible to my mind that the right of a passenger to redress against a stranger for an injury, caused directly and proximately by the latter's negligence, should be denied, on the ground that the negligence of his carrier contributed to his injury, he being without fault himself, as it would be to hold such passenger responsible for the negligence of his carrier, whereby an injury was inflicted upon a stranger. And of the last proposition, it is enough to say that it is simply absurd.

While we acknowledge the high authority of cases holding views contrary to those above expressed (*Thorogood v. Bryan*, 8 C. B., 115; *Armstrong v. Lancashire Railway Co.*, 10 Exch., L. R. 47, and *Lockhardt v. Lichtenthaler*, 46 Penn. St. 151), we find, on the other hand, many cases of equally high standing holding, and we think, with better reason, that the negligence of the carrying company cannot be imputed to a passenger who is rightfully on its train, and who is guilty personally of no fault or negligence, in an action by such passenger against another party, whose negligence has contributed directly to his injury. (*Chapman v. New Haven R. R. Co.*, 19 N. Y. 341; *Colegrove v. N. Y. & N. H. R. R. Co.*, 20 id. 492; *Bennett v. N. J. R. R. Co.*, 36 N. J. 225; s. c., 13 Am. Rep. 435; 1 Smith Lead. Cas. 450 (6 Am. ed.); *Prideau v. City of Mineral Point*, 43 Wis. 513; s. c., 28 Am. Rep. 558; *Griggs v. Fleckensten*, 14 Minn. 81; *Eaton v. B. & L. R. Co.*, 11 Allen, 500, *Ricker v. Freeman*, 50 N. H. 420.

We are also aware that by an almost unbroken line of decisions it is held that the negligence of a common carrier of goods, contributing to the injury of such goods while in its possession, is a good defense to an action by the owner of the goods against a third person whose negligence also contributed to the injury.

Whether these decisions conflict with the doctrine announced in this case depends entirely on the question whether or not a distinction, on principle, can be made between cases of carriers of goods and carriers of passengers. That there is a marked distinction between the relations of the parties to these different contracts is quite certain. The common carrier of goods has actual possession of and absolute control over them, and is an insurer against loss or damage, except when occasioned by the act of God or a public enemy; while the carrier of passengers is only bound to the exercise

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of care; so that in case of injury to a passenger over whose conduct the carrier has no physical control, his own misconduct bars his remedy, whether the injury was caused by the concurring negligence of the carrier or the joint negligence of the carrier and others; but in the case of goods, where the thing carried is incapable of contributory negligence, the law requires its safety to be insured. Now it may be that public policy, in the interest of trade and commerce, will not permit the liability of the carrier, who has failed in his duty in relation to goods, to be shifted to another, either with or without the consent of the owner; and therefore it may be that the law, in such case, requires the owner to seek redress from the carrier alone. But however this may be, we are unanimous in the opinion that for a personal injury to a passenger, who is himself without fault, occasioned by the joint and concurring negligence of the carrier and another person, there is no sound principle of law which precludes the injured party from seeking redress from both or either of the wrong-doers.

Judgment affirmed.

BARNETT V. WARD.

(36 Ohio St. 107.)

Slander — charge of unchastity — variance.

An imputation that a woman is unchaste is actionable in itself.

A charge that a woman has slept with a man not her husband is an imputation of unchastity.

A charge that a woman has slept with a specified man, who bears a different name from her husband, is *prima facie* a charge of sleeping with another man than her husband.

Where it is alleged that the defendant charged the plaintiff with sleeping with another man than her husband, and the proof is that he charged that such a person was in bed with her, *held*, no variance.

ACTION of slander. The opinion states the facts. The plaintiff had judgment below.

T. F. Thompson, for plaintiff in error.

A. G. McBurney and *Durbin Ward*, for defendant in error.

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BOYNTON, J. It has long been the settled law of this State, that words uttered in the presence and hearing of others, imputing to a woman a want of chastity are in themselves actionable. It being their immediate and direct tendency to exclude her from society, and to bring her into disgrace among those who may credit the charge imputed, thereby producing an injury from which damage necessarily results, a presumption of damage is made to supply the place of actual proof. The plaintiff in error, not doubting the rule thus stated, claims nevertheless that the judgment of the District Court ought to be reversed upon each of three grounds. First. That the charge laid in the petition does not impute a want of chastity to the defendant in error. Secondly. That it was not made to appear that she was an unmarried woman; and lastly, that there is a fatal variance between the words laid and the proof received to sustain them. Both courts below were of the opinion that the facts stated in the petition constituted a cause of action, and in that opinion we fully concur. The plain and obvious import of the language, charging the defendant in error with sleeping with John Fox, during the night her watch was stolen, was to impute to her illicit intercourse with Fox. No one could hear the language uttered without understanding from it that the person uttering it intended to charge that such intercourse had in fact taken place. As was said in *Shields v. Cunningham*, 1 Blackf. 86, a phraseology more indecent might have been used, but no set of words, however plain and explicit, would have conveyed the idea with more certainty. See *Townshend on Slander*, § 172; *Guard v. Risk*, 11 Ind. 156.

The objection that no testimony was offered showing or tending to show that the plaintiff was an unmarried woman, is equally untenable. It is quite immaterial whether she was married or single. It is only important to know that she was not the wife of Fox, and this presumptively appeared from the circumstance that she did not bear his name. If in the face of this presumption, and notwithstanding it, it was claimed that she was the wife of Fox, the burden was on the defendant below to establish the fact by proof.

It is finally objected that there is a fatal variance between the words laid in the petition, and those proved to have been spoken.

If the validity of this objection were to be determined by the rules governing the practice before the adoption of the code, a more difficult question would perhaps arise. The rule at common law

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required the words to be proved substantially as laid. Numerous cases held that the same meaning in different words would not support the charge. However this may have been under the former practice, the question arising under the objection here made is to be determined by the rules established by the Code. Thomas Turney testified that the defendant below stated in his hearing, of and concerning the plaintiff, that "the way he, Fox, found the watch, he was in bed with her."

Without looking into other parts of the testimony, we think the variance between this language and the words alleged to have been spoken was not such as to justify the court in arresting the case from the jury, and in directing a nonsuit. The Code provides, that no variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice, in maintaining his action or defense on the merits. Whenever it is alleged that a party has been so misled, that fact must be proved to the satisfaction of the court, and it must also be shown in what respect he has been misled; and thereupon the court may order the pleading to be amended, upon such terms as may be just. Code, § 131.

The court is not authorized, in view of this provision, to determine from hearing the testimony of the witnesses given at the trial, whether the variance is so far material as to have misled the defendant to his prejudice, unless the allegation to which the proof is directed is so far unproved in its general scope and meaning, as to amount to a failure of proof. Code, § 133. Where there is not such failure of proof, in order to invoke the action of the court, it must be shown not only that the party has been misled to his prejudice by the variance, but the respect in which he has been misled must also be made to appear to the satisfaction of the court.

The court then determines whether it will grant leave to amend or not. If leave is granted the trial proceeds, unless a continuance becomes necessary by reason of the amendment. In the present case, it not only was not shown that the defendant below was misled to his prejudice by the supposed variance, but that he was so misled was not even suggested. Indeed it is not easily seen how he could have been misled by a variance so slight. The words proved as well as those in which the charge was laid, imputed to the plaintiff below a want of chastity. The words proved were slightly variant from those alleged, but they were clearly of the same import and

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meaning. That the defendant below could have been misled by a difference in the phraseology apparently so immaterial, is hardly to be believed.

At all events in the absence of any claim or showing that the defendant below was misled to his prejudice by the variance, the court was not authorized to dismiss the action.

It follows therefore that there was no error in the judgment of affirmance.

Judgment affirmed.

 MOOREHOUSE V. CRANGLE.

(33 Ohio St. 130.)

Statute of frauds — debt of another.

A stockholder and president of a corporation orally promised M. that if he would subscribe and pay \$500 to the capital stock, he should receive fifteen per cent on that amount in a year. *Held*, not a contract to answer for the debt, default, or miscarriage of another.

ACTION on oral agreement. The opinion states the case. The defendant had judgment below.

D. D. T. Cowen, for plaintiff in error.

L. Danford and St. Clair Kelly, for defendant in error.

JOHNSON, J. This case calls for a construction of the 1st clause of section 5 of the Statute of Frauds, which provides: "That no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another; * * * unless the agreement * * * or some memorandum or note thereof shall be in writing."

Moorehouse, the present plaintiff, was plaintiff below. He charges in his petition that the defendant was a large stockholder, and president of a manufacturing corporation—the National Glass Manufacturing Company—and being desirous of procuring an increase of its capital stock, "for his own personal gain and profit, promised, agreed and guaranteed to and with the plaintiff, that if the plaintiff would subscribe and pay five hundred dollars to the capital

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stock of said company, he, the said plaintiff, should receive fifteen per centum on the amount so subscribed and paid by him, within one year thereafter."

In consideration of this promise, the plaintiff subscribed and paid into the capital stock of said company, said amount.

It is further alleged that no dividend was declared or earned by said company within one year, nor did the plaintiff receive fifteen per cent or any other amount for the use of the money so paid by him, wherefore he asks a judgment for \$75.

To this the defendant interposes: 1st. A denial of the contract. 2d. That the contract is one to answer for the debt, default or miscarriage of another, and so should be in writing. 3d. Upon a trial to a jury, evidence was offered tending to support the cause of action and the answers, and the court was asked by plaintiff to charge: that "If you find from the testimony that the promise set up in the petition was made substantially, and that the National Glass Manufacturing Company did not earn or become liable to the plaintiff for any dividend within the first year, the contract need not be in writing, if you find that it was to be performed within a year." Which charge the court refused to give, but charged the jury as follows:

"The jury must determine from the testimony and all the circumstances, what was the contract. Was it an original contract, that is, was the defendant bound himself to pay, or was he only to answer for the default or miscarriage of the company, or to pay in case the company did not? If the testimony shall satisfy you that the contract was an original contract on the part of the defendant to pay at all events, then your verdict should be for the plaintiff; but if from the testimony the jury shall be satisfied that the contract, agreement or guaranty was in effect, to pay if the manufacturing company did not pay, then in that view, the contract would be a collateral contract, and not being in writing and signed by the defendant, or some one authorized by him, the plaintiff cannot recover, and your verdict should be for the defendant."

To which refusal of the court to charge as requested, as well as to the said charge as given, the plaintiff, by his counsel, excepted.

The petition, the charge requested, and the charge given, present the single question: is the contract alleged one to answer for the debt, default or miscarriage of another? or stating the question in another form: is it collateral or an original undertaking?

The terms of the statute make it clear, that a collateral promise, or one to answer for the liability of another, is one where there is a debt or obligation of another than the promisor, for whose default he undertakes to be liable. An original liability of another is the foundation of the collateral liability of the promisor. We accept the statement of the law by defendant's counsel as substantially correct, that "where it is expressly agreed, or is to be implied that some other person is, or is to become liable primarily, the contract is collateral." Numerous cases may be cited illustrating this rule.

Thus, in *Hill v. Smith*, 21 How. 283, it appeared that plaintiff had sold land to a railroad company, the price of which was paid in stock of the company, which the defendant *guaranteed* should be at par within three years. This was held to be an original and not a collateral contract.

In noticing the word "guaranty," which was used in that contract, and which was relied on as importing a collateral contract, it is said, this term is usually applied to a collateral undertaking, yet when taken in connection with the other terms of the instrument, the contract is clearly an original, independent one.

So, in *Green v. Brookins*, 23 Mich. 74; s. c., 9 Am. Rep. 74, G., who claimed to have an interest in a patent hay-fork, verbally promised B., in consideration that he should take two shares of the capital stock of a company, to be organized to deal in said patented article, and the rights under said patent; that such shares should not cost him any thing; and further promised that as soon as the company should be organized he would find a man to take the shares for the amount of the note, and that B. should not be at any cost or expense. It was held that this promise was not within the statutes, for the reason that it was not an undertaking to answer for the acts of another. There was no debt or obligation of another to answer for, therefore it was an original contract.

This question was fully discussed in the notes to *Forth v. Stanton*, 1 Wms. Saunders, 211, where it is said: "The question is, *what is the promise?* Is it a promise for the debt, default or miscarriage of another, *for which that other remains liable?*"

If we apply this fundamental rule to the case before us, it becomes easy of solution. The defendant, in consideration that plaintiff would subscribe and pay \$500 to the capital stock of the company of which he was president, and in which he was a large

stockholder, agreed that the plaintiff should receive fifteen per cent on the amount thus invested, within one year. If this contract is not within the statute of frauds, the plaintiff is entitled to recover, as it is not doubted but that the consideration stated is sufficient.

Was there any debt, obligation or legal duty, express or implied, owing by the corporation to the plaintiff as a stockholder, for which the defendant undertook to answer upon default of the corporation?

The obligations legally imposed upon the corporation, and upon those charged with the duties of managing the corporate business, in favor of the plaintiff as a stockholder, were only such as were common to all stockholders. These corporate authorities were bound to good faith and to reasonable care, skill and diligence, with a view to profit, in the prosecution of the business of the corporation. If profits thereby accrue, it becomes the duty of these authorities to declare such dividends out of the same, from time to time, as the nature and condition of the business should warrant.

The defendant did not undertake to answer for any debt, default or miscarriage by the corporation, growing out of a failure to perform any of these duties. Indeed so far as the record discloses, all these obligations in favor of the plaintiff have been faithfully performed by the corporate authorities.

Most clearly therefore it appears that there was no corporate contract, express or implied, for which defendant made himself responsible. His contract was entirely distinct and independent of the obligation of the corporation to the plaintiff. The corporation had no power to obligate itself in advance to pay to plaintiff as a dividend, or otherwise, the sum which defendant agreed he should receive on his investment. There was then no corporate debt or obligation, express or implied, to pay to plaintiff any amount on his investment. Defendant's contract was, in legal effect, essentially different from the obligations of the corporation in favor of plaintiff as a stockholder, and the liability created was wholly independent of any default by the corporation. It was not an undertaking to answer for the default of the corporation.

In refusing to charge as requested, we think the court erred. The request refused was specific, and was based upon the allegations of the petition. The plaintiff was entitled to have it given to the jury. For refusing to give this request, the judgment must be reversed.

Cook v. Slate Company.

We do not think this refusal was cured by the charge given. It contained no explanation of the distinction between an original and a collateral promise applicable to the case on trial, nor any information as to the duties and liabilities of the corporation as the foundation of a collateral undertaking. There was no evidence, so far as the record discloses, tending to show that the contract was collateral. The issue presented no such question. The second answer merely alleged that the promise, "set forth in the petition," was a special promise, not in writing. This was an issue of law. The first answer was a denial that he made the contract set forth. The only issue of fact presented was whether the contract set forth was proved. If so, the plaintiff was entitled to recover.

This issue did not call for an exposition of the law touching collateral promises.

It is claimed that the charge given as to plaintiff's right to recover on an original contract was the equivalent of the request refused. If this be conceded, then the court is placed in the anomalous position of charging and refusing to charge the same proposition. But a general proposition, abstractly correct though it be, cannot be regarded as curing the error of a refusal to charge a specific proposition, applicable to the case. *Pitts., etc., R. Co. v. Krouse*, 30 Ohio St. 222.

Judgment reversed.

COOK V. SLATE COMPANY.

(26 Ohio St. 125.)

Evidence of partnership — mercantile reports — declarations of third persons.

The existence of a partnership cannot be proved by reports of a mercantile agency or the oral declarations of third persons.*

ACTION on a note. The opinion states the point. The plaintiff had judgment below.

J. H. & J. A. Clemmer, for plaintiff in error.

* In *Ritzer v. James*, 26 Kana. 231, when evidence of general understanding and report had been admitted to prove a partnership, in addition to other and competent evidence, the court refused a new trial.

 Woolever v. Stewart.

R. C. Pugh and Wm. H. Pugh, for defendants in error.

WHITE, J. The court erred in the admission in evidence of the reports of the mercantile agency. The question in issue was whether Carter Cook was a member of the firm at the time the goods were ordered and the note was given ; or if he was not a partner in fact, whether his conduct was such in regard to the transaction that the plaintiffs were authorized to charge him as such partner. There is nothing in the evidence to show that the defendant authorized these reports or was in any way connected with them. They cannot therefore be used to charge him with liability. So also is the testimony of the witness, Waters, incompetent that on the same day he got the order he inquired at the store of Dunn & Witt, who were the partners in the firm of Hall & Cook, and was informed by the book-keeper that Carter Cook was one of the partners. If he was ignorant of whom the firm was composed, his duty was to make inquiry of those he was about to credit, and not of strangers.

[Omitting minor points.]

Judgment reversed and cause remanded for new trial.

 WOOLEVER V. STEWART.

(38 Ohio St. 144.)

Constitutional law — requiring fish-way in dam on non-navigable stream — adverse possession.

One who has maintained a dam across a non-navigable stream for twenty-one years cannot be required by statute to construct and maintain a passage-way over the same for fish.

ACTION for materials and services in constructing, by the order of county commissioners, a fish-way over a dam, under a statute directing such erection. The opinion states the facts. The plaintiff had judgment below on demurrer.

W. P. Howland and Simonds & Wade, for plaintiff in error.

Northway & Filch, for defendant in error.

BOYNTON, J. We think the court erred in sustaining the demurrer of the plaintiff below, to the first defense of the answer.

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It appears from the facts stated therein, that the dam over which the chute or passage-way for fish was constructed, was built more than fifty years ago, and that the defendant and those under whom he claimed had enjoyed its use uninterruptedly, and without any complaint from upper riparian owners, during that period of time. He traced his title, through several mesne conveyances, to the State of Connecticut, and alleged that there was no reservation therein, or limitation upon the right or interest that they purported to convey. The river across which the dam was constructed was non-navigable. No compensation was awarded for any injury to his property, or for that portion taken for the construction of the chute.

From these facts, there is little difficulty in solving the questions arising upon the assignments of error. For if it be granted that the upper riparian proprietors of land on a non-navigable stream have the right to the free and unobstructed passage of fish from the waters below to those adjoining their lands, or where they own the bed of the stream, to the waters covering such bed, it is a right that may be lost by adverse use in another; and the uninterrupted use and enjoyment of a dam across such stream, in the assertion of a right to such use, continued for the period of twenty-one years, are as conclusive of the right to such enjoyment in the future, as if the same were acquired by grant. The right of the upper owners to the free passage of fish up the river to their fisheries is certainly no higher than their right to be protected against injuries resulting from setting water back upon their lands, and no principle seems to be more firmly settled, than that the exercise of such right adversely by a lower owner for the period of twenty-one years ripens into the right to continue such use, although none in fact existed before. Ang. on Water-courses, § 208, *et seq.*

The right by such use becomes vested, and is as fully within the protection afforded by the Constitution against legislative interference as any other, however acquired. Assuming therefore without deciding the point, that a lower owner has no right to obstruct the passage of fish up a non-navigable stream, by the erection of a dam across the same, or otherwise, to the injury of those above, they alone can complain, and if they permit an adverse enjoyment to ripen into a title, the right to cause such obstruction to be removed is gone. *Carter v. Murcot*, 4 Burr. 2162. See also, *Bristow v. Cormican*, L. R., 3 App. Cas. 666.

This is the condition of the present case. The right to the unmo-

lest use of the dam and to the bed of the stream, at the time the chute or passage-way was constructed, and at the time the statute was enacted, was the private property of the defendant below. It therefore could be taken from him only by observing the requirements of the Constitution. To the extent his property was taken for public use, he was entitled to compensation, and unless required for such use it could not be taken at all. Much less could the legislature require him to perform labor upon it, or be at any expense in fitting it for public enjoyment. The act of January 31, 1871, under which the passage-way was constructed, seems founded on the doctrine that the right of the owner of the dam to construct the same across the river, although he may own to the thread of the stream, is subject to the implied limitation that he keep open a sufficient passage-way for fish to the water above; and cases were cited in argument, from Massachusetts, which recognize such limitation to be well established in that Commonwealth, whatever the rule may be elsewhere.

On the other hand, there are many well-considered cases, which deny the existence of any such limitation where the stream is non-navigable, and the adjoining owner's boundary extends to the thread of the stream. Hargrave Law Tr. 5; *People v. Platt*, 17 Johns. 211; 8 Am. Dec. 382; *State v. Glen*, 7 Jones (N. C.), 321. We need not determine in the present case which line of decisions is correct, when applied to a dam newly erected, as the unconstitutionality of the act when applied to the facts stated in the answer is clearly established. If there was an implied obligation resting on the owner of the dam, to keep a way open for the passage of fish to the waters above, it was for the benefit of the upper owners, and for them only; and if they suffered an adverse use to ripen into an adverse right, the right thus acquired could neither be destroyed nor impaired by legislation. Cooley's Const. Lim. 362, and note.

[Omitting minor points.]

Judgment reversed and cause remanded for further proceedings.

MELVIN V. WEIANT.

(36 Ohio St. 184.)

Slander — sodomy.

A false charge of sodomy is not slanderous in itself.

ACTION of slander. The opinion states the case. The defendant had judgment below.

H. T. Van Fleet, for plaintiff in error.

Scofield & Johnston, for defendant in error.

BOYNTON, J. The original action was one of slander, the petition in which charged the defendant with maliciously speaking of and concerning the plaintiff, in the presence of others, words imputing to him an act of sodomy. A demurrer to the petition was sustained, and judgment given for the defendant. On error to the District Court, the judgment of the court of common pleas was affirmed. The object of the present proceeding in error is to reverse both judgments. We fully agree with counsel for the plaintiff, that the words spoken of his client were of the grossest and most scandalous character. It would be difficult to put into words, a charge, which, if believed, would more certainly exclude from society the one against whom the same was made, or more surely expose him to public odium and disgrace. Formerly, in England, the offense was deemed of a nature so heinous, that the delicacy of the common law would not permit it to be named in its indictments. 4 Bl. Com. 215.

But notwithstanding this, the act itself has never been declared a crime in Ohio. Nor has it ever been enacted that an imputation that a person is guilty of such act, however untrue and malicious, shall lay the foundation for an action of slander. It may be, and quite likely is, true, that this want of statutory regulation upon the subject has resulted, in the one case, from a reluctance to believe that a human being could be found sufficiently depraved to perpetrate so foul an act; and in the other, so reckless of another's rights as to charge the existence of such act, without the most undoubted proof of its truth.

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However this may be, the fact remains that no statutory regulation upon the subject exists, and from this it follows that the words set out in the petition are not in themselves actionable, and consequently, unaided as they are by matter showing special damage, lay no foundation for recovery, unless, because of the character of the act imputed by them, they are held to constitute an exception to the general rule. See *Hollingsworth v. Shaw*, 19 Ohio St. 430. This precise question was before the commission in *Davis v. Brown*, 27 id. 326, where it was held that no such exception prevailed.

To this ruling we are inclined to adhere. Some members of the court in view of the heinous character of the charge, and of its direct and certain tendency to degrade and exclude from decent society the person against whom the same is made, would have inclined to regard the injury as one which the law, now existing, is adequate to redress, while the remaining members are of the opinion that *Davis v. Brown* was correctly decided.

We are all agreed however that that case ought not to be overruled. If injustice may result, as doubtless it may, from adhering to the rule there asserted, the remedy is with the legislature.

It would be an easy matter to make sodomy a crime, or to give the party wrongfully charged with committing it a right of action against his accuser.

Judgment affirmed.

UNION CENTRAL LIFE INSURANCE COMPANY V. CHEEVER.

(36 Ohio St. 201.)

Insurance — life — evidence — declarations of insured as against beneficiary.

On application of husband and wife the husband's life was insured for the wife's benefit. In the application the insured stated that he had had no disease or sickness in the last seven years. The policy was conditioned to be void if the statements in the application were not in all respects true. In an action by the wife on the policy, *held*, that declarations by the insured prior to the application, to the effect that he had been cured of a cancer about a year before, were incompetent.*

In argument to the jury counsel cannot read and comment on matter not in evidence, irrelevant and prejudicial. (*See note, p. 573.*)

* *Contra*: *Dilleber v. Home Life Ins. Co.* (69 N. Y. 256), 25 Am. Rep. 182.

ACTION on a policy of life insurance on the life of Charles E. Cheever. The head-note and opinion show the facts. The pamphlet read to the jury, and referred to in the opinion, contained such passages as the following :

“**QUALITIES OF A GOOD AGENT.** The public generally forms its opinion of a life insurance company by its acquaintance with its agents. The good agent appreciates this fact ; and also that men will judge of the whole system of life insurance by him. He has high ideas of his work. He looks upon it as benefiting the party assured by giving to him quiet of mind ; by inducing habits of economy, sobriety and forethought ; by setting before him an honorable motive to action and enterprise ; and by leading him to the discharge of a sacred duty. He considers that his efforts are helping to rid the community of poverty and its frequent attendants, vice and crime ; and also that he is strengthening the sinews of social life by every policy he obtains ; and what is more, that he is befriending the poor and needy, wiping sorrow from eyes dimmed with tears, and deserving the tribute of gratitude awarded to one of old : ‘ When the ear heard me, then it blessed me ; and when the eye saw me, it gave witness to me ; because I delivered the poor that cried, and the fatherless, and him that had none to help him. The blessing of him that was ready to perish came upon me, and I caused the widow’s heart to sing for joy.’

“ Agents should cultivate the acquaintance of the clergy and by every suitable means endeavor to secure their influence. In most cases a minister will give a note of introduction, or a general letter commendatory of the agent and the company. Often too a pastor will furnish a list of the members of his parish who are most likely to insure. It is of great importance to effect an insurance upon the minister’s life. If you are associated with Sunday-schools, churches, or any other organization, avail yourself of the acquaintance it will give you.

“ When a death occurs in a community, especially if the party be assured, and where it is of great advantage to the surviving members of a family, particulars may be profitably obtained, and the circumstances commented upon. Perhaps the relatives and friends may be induced to insure. Very few communities do not furnish examples where a life-policy upon a deceased parent would have been a god-send to the afflicted household. It is not only proper to refer to such cases, but an agent is not fulfilling his duty if he does

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not interpret and apply such providences as a warning against the neglect of life insurance. Sudden death gives especial point to such appeals."

Matthews, Ramsey & Matthews, for plaintiff in error.

E. S. Throop, C. D. Robertson and I. M. Jordan, for defendant in error.

BOYNTON, J. As the case will go back for a new trial, we have deemed it necessary to consider only two assignments of error.

1. Did the court err in rejecting the letter given to Dr. Gratigny by Charles E. Cheever, and the letter of Job S. Haworth with Cheever's memorandum thereon? Although the letter of Cheever bears the date of January 1, 1870, it evidently was written January 1, 1871, as Cheever's address at the foot of the letter bears the date of December 31, 1870, and the case shows that Dr. Gratigny was not consulted prior to August of that year. There is no doubt that the letter and memorandum, if admissible, tended to prove that Cheever had had "sickness and disease" during the seven years prior to July 31, 1871, the date at which the insurance was effected, and for which he had received medical treatment from several physicians. But the testimony, we think, was incompetent. The insurance was in terms effected for the sole benefit of the plaintiff below. The testimony rejected consisted of declarations of Charles E. Cheever, made, it is true, prior to the time the insurance was effected, but not under circumstances at all affecting the rights subsequently acquired under the policy, by the plaintiff below. When the letter was written, or the memorandum made, Cheever could not have been acting as her agent. They were not the declarations of a sick person in relation to his present condition, as they related to a state of facts already past. *Fraternal Mutual Ins. Co. v. Applegate*, 7 Ohio St. 297. They were not a part of the *res gestæ* of any act or fact, then transpiring, which they tended to characterize or explain. *Swift v. Massachusetts M. L. Ins. Co.*, 63 N. Y. 186; s. c., 20 Am. Rep. 522. They neither accompanied nor were explanatory of an act performed by Cheever. Hence as respects the rights of the wife, they were the declarations of a stranger. There is no doubt that where evidence of an act done by a party is admissible, his declarations made at the time explanatory of the act and tending to elucidate it, are also admissible as a

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part of the *res gestæ*. But it is only where some act is itself relevant and material, and to which the declarations relate, and which they tend to explain, that they become competent. *Morrill v. Foster*, 32 N. H. 358. The effect of the declarations offered was, that Cheever formerly and about a year before, had been sick of cancer, and was cured by Dr. Gratigny. This was but a naked declaration concerning a past transaction or fact, and wholly unavailing to bind or affect any one except the declarant himself. Granting this, counsel for the plaintiff in error contend that such declarations were admissible to prove that at the time the application was made, Cheever knew that the representations were false, and therefore fraudulent. But it is quite immaterial whether he was or was not aware that the representations were false. The parties to the policy stipulated, that if the representations or any of them, were untrue the policy should be void, and the court gave to the company in its instruction to the jury the full benefit of this stipulation. *Aetna Life Ins. Co. v. France*, 91 U. S. 510. Knowledge of the falsity of the representations being an immaterial fact, there was no error in rejecting the testimony offered to show it.

But we are of the opinion that the permission to counsel for the plaintiff below, against the objection of the defendant, to read to the jury and comment thereon, the pamphlet prepared by the secretary of the company for use by its agents, was an abuse of discretion preventing a fair trial. It had been offered in evidence and upon objection withdrawn. It was permitted to be read by counsel to "illustrate his argument." It will be noticed that it was not even prepared by the company which issued the policy on the application alleged to contain the false answers to the questions relating to the prior sickness of the subject insured. It therefore could have had no influence upon the conduct of the agents of the company to which the application was made.

In *Legg v. Drake*, 1 Ohio St. 287, it was held, that counsel had the right by way of argument or illustration to read a pertinent quotation or extract from a work on science or art, as well as from a classical, historical, or other publication, because, as was there stated, it would make no difference whether repeated by counsel from recollection, or read from a book; but that it would be an abuse of privilege to make the right thus to do the pretense of getting improper matter before the jury.

To the rule there stated we fully adhere. The matter read or

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stated should be pertinent to the subject of inquiry, and so far calculated to elucidate it, as to aid the jury in a better understanding of the evidence produced at the trial. The matter read to the jury and commented on in the case before us was not of this character. The question in issue related wholly to the truth or falsity of the statements of the subject insured, contained in the application respecting his previous condition of health. The matter contained in the pamphlet had no possible bearing upon that subject. It was filled with directions and suggestions, well calculated to excite prejudice against a company resorting to such methods to secure additions to its policy-holders, and to draw the minds of the jury away from the matter in dispute, and subject them to influences entirely foreign to the case. It contained not a word, tending to show whether Cheever had been sick or diseased during the seven years prior to the application for insurance, which was the sole question under investigation.

In the selection of jurors care is not only taken to obtain persons entirely impartial, and free from any bias resulting from previously-formed opinions, but the law carefully guards them, during the progress of the trial, from the approach of the least improper influences which are calculated to affect their judgment. They are sworn in all cases to try the issue joined, and to render a true verdict, according to the law and the evidence given in the case. The law has established well-defined rules determining the admissibility of evidence, one of which is that the evidence offered must correspond with the allegations, and be confined to the point in issue. All hearsay evidence is excluded. The jury must receive the evidence from witnesses under oath ; it being the right of the party prosecuting or defending, to have the trial conducted according to the established usage of the common law. If a juror possesses personal knowledge of a fact, pertinent to the issue, he must be sworn as a witness, before any benefit can be derived to either party by the knowledge thus possessed. These are some of the safeguards the law throws around the rights of parties litigant, while undergoing judicial inquiry ; and it is easy to see that they would be of little avail, if during the progress of the trial, and with the sanction of the court, their effect could be destroyed or evaded by the latitude of speech or comment which the law accords to counsel. Facts, of which no proof is offered and no presumption arises, are legally outside of the case, and cannot be brought before the jury under any pretense whatever.

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This is held by numerous cases besides those cited in argument. *Tucker v. Henniker*, 41 N. H. 317; *Rolfe v. Rumford*, 66 Me. 564; *Berry v. State*, 10 Ga. 511; *Dickerson v. Burke*, 25 id. 225; *Koelges v. Guardian Life Ins. Co.*, 57 N. Y. 638.

In *Bain v. Wilson*, 10 Ohio St. 14, it was held to be error for the court to base a charge to the jury on a state of facts purely conjectural, and as to which it affirmatively appears, no evidence was given at the trial. In the course of the opinion, it was said that "the judge must confine himself in his remarks to the law and evidence in the case. So far from being under any obligation to call the attention of the jury to a conjectural state of facts, it would be highly improper for him to do so." See also, *Walker v. Stetson*, 14 Ohio St. 90. The reason of this rule is very obvious, and is thus stated: "Jurors are constantly inclined to look to the opinion of the judge for instruction as to what is, and what is not evidence; when he tells them to determine a given problem from the evidence before them, they can hardly do otherwise than infer, that in his judgment, there is evidence upon which their verdict, when given, may rest." *Id.*

It is but another application of the same process of reasoning, to say, that when the court below permitted counsel for the plaintiff to read and comment upon the pamphlet of instructions to agents, issued by the defendant, the jury might justly infer that the court was of the opinion that the matter thus read and commented on, might properly affect their verdict. The testimony given respecting the disease of which Cheever died, was more or less conflicting. Some of the medical witnesses were of the opinion that he died of a recurrence of the alleged cancerous ailment treated by Dr. Gratigny, while others were of the opinion that death was caused from a distinct and independent disease, originating after the policy took effect, and that the sore or tumor upon the neck did not amount to sickness or disease, as those terms are commonly understood. In view of this conflict in the testimony, we do not see how the reading of the pamphlet to the jury could be otherwise than prejudicial to the defendant to the extent of preventing a fair trial.

Judgment reversed, and a new trial ordered.

NOTE BY THE REPORTER. — In *Legg v. Drake*, 1 Ohio St. 286, the proposition was to read from Youatt's work on Veterinary Surgery. (This was the work excluded from evidence in *Harris v. Panama R. Co.*, 3 Bosw. 7.) The reading was forbidden. The court on appeal said: "It is not to be denied but that a pertinent quotation or extract from a work on science or art, as well as from a classical, historical or other publication, may by

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way of argument or illustration be not only admissible, but sometimes highly proper. And it would seem to make no difference whether it was repeated by counsel from recollection or read from a book. It would be an abuse of this privilege, however, to make it the pretense of getting improper matter before the jury as evidence in the cause." But it not appearing from the bill of exceptions that the passage proposed to be read had any relevancy to the cause, or came within the appropriate and legitimate scope of argument, it did not appear that the party was injured by its exclusion, and the court refused to reverse on this ground. So what was said on this point was *obiter*.

In *Reg. v. Courvoisier*, 9 C. & P. 362, counsel proposed to read to the jury on the argument some observations of a judge in another case, upon the nature and effect of circumstantial evidence. This was allowed on the ground that counsel might adopt and utter them as his own sentiments and a part of his speech. But reading such matter is very different from reading scientific opinions. Every man has a right to form opinions on such matters. It is mere philosophy. They are not matter of expert knowledge. But matters of expert knowledge ought to be brought within the sanctions of evidence. In *People v. Anderson*, 44 Cal. 70, however, even the reading of reported cases to the jury in argument, as a general rule, was pronounced "objectionable," and it was said it "ought not to be tolerated. Its usual effect is to confuse rather than to enlighten the jury." Still the court in that case deemed the matter discretionary in the court, and reversed the judgment because the judge had told the jury that the reading was improper and was calculated to mislead them!

In *City of Ripon v. Bittel*, 30 Wis. 614, the question was on the admission of surgical treatises in evidence. The court said it was urged that they were improperly admitted, and should only have been allowed to be read in argument, and that "such perhaps may be the general rule." But their admission was approved. This therefore is not an authority upon the point in question.

In *Commonwealth v. Wilson*, 1 Gray, 387, SHAW, C. J., held that scientific books cannot be read in argument to the jury. He said: "Facts or opinions on the subject of insanity, as on any other subject, cannot be laid before the jury except by the testimony under oath of persons skilled in such matters. Whether stated in the language of the court, or of the counsel in a former case, or cited from the works of legal or medical writers, they are still statements of fact, and must be proved on oath. The opinion of a lawyer on such a question of fact is entitled to no more weight than that of any other person."

This was reiterated by the same great judge, in *Ashworth v. Kittridge*, 12 Cush. 193. He there said: "Where books are thus offered, they are in effect used as evidence, and the substantial objection is that they are statements wanting the sanction of an oath; and the statement thus proposed is made by one not present and not liable to cross-examination. If the same author were cross-examined, and called to state the grounds of his opinion, he might himself alter or modify it, and it would be tested by a comparison with the opinions of others. Medical authors, like writers in other departments of science, have their various and conflicting theories, and often defend and sustain them with ingenuity. But as the whole range of medical literature is not open to persons of common experience, a passage may be found in one book favorable to a particular opinion when perhaps the same opinion may have been vigorously contested and perhaps triumphantly overthrown, by other medical authors, but authors whose works would not be likely to be known to counsel or client or to court or jury. Besides, medical science has its own nomenclature, its technical terms and words of art, and also common words used in a peculiar manner, distinct from their received meaning in the general use of the language. From these and other causes, persons not versed in medical literature, though having a good knowledge of the general use of the English language, would be in danger, without an interpreter, of misapprehending the true meaning of the author. Whereas a medical witness would not only give the fact of his opinion and the grounds on which it is formed with the sanction of his oath, but would also state and explain it in language intelligible to men of common experience." (This proves a violent presumption, in practice, we think.) "If it be said that no books should be read, except works of good and established authority, the difficulty at once arises as to the question, what constitutes 'good authority?' more especially whether it is a question of competency to be decided by the court, whether any particular book shall be received or rejected; or a question of

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weight of testimony, so that any book may be read, leaving its weight, force and effect to the jury. Either of the alternatives would be attended with obvious if not insuperable objections." This is certainly very strong reasoning against the admission of such books in evidence as well as against the reading of them as part of an argument.

In *State v. Hoyt*, 46 Conn. 330, a murder case, it was held that standard medical works on insanity may be read to the jury by the counsel for the accused, on the question of his insanity. The court said: "The plea of insanity interposed in behalf of persons indicted is supported by the testimony of persons who by study of books and men have entitled themselves to speak as experts in that science. By way of vindication of their right to be heard as instructors of the jury, they usually preface their testimony by a statement of the extent of their experience in the treatment of persons afflicted with disease of the mind, and the time given to the reading of treatises upon insanity written by men of wide experience and acknowledged ability in the treatment of such diseases; their opinion is the result of observation of men and reading of books. And in this jurisdiction for a long series of years counsel have been permitted to read to the jury, as a part of their argument upon this part of their case, extracts from such treatises as by the testimony of experts have been accepted by the profession as authority upon that subject, such treatises as have helped to form the opinion expressed by the expert. The practice by repetition has hardened into a rule; a rule, upon the continued existence of which counsel for the accused in the case before us had a right to rely, the abrogation of which by the ruling complained of may have been a surprise. The question is not, shall such reading be now for the first time permitted? It is, shall it now for the first time be forbidden without notice? We think that privileges hitherto granted to persons in like circumstances with the accused should not be denied to him, to his possible prejudice."

This, it will be seen, is based on the idea of fixed and ancient custom, and not upon principle. LOOMIS, J., dissenting (PARK, C. J., concurring with him), said: The exclusion of the book at the trial "was correct in principle, because the subject-matter belonged exclusively to the realm of fact and not of law. It was a matter of evidence to be given to the jury under the sanction of an oath, and subject also to that other most important test of truth, the right of cross-examination. This wholesome principle ought not to be sacrificed except for most cogent reasons. And what reason is given in this instance? Only that a different practice has for some years prevailed. Not a practice ever sanctioned, directly or indirectly, by this court, nor one which has generally been considered by the judges on the Circuit as of binding force in law, but rather as subject to the discretion, which, it is true, has been usually exercised in favor of the accused in capital trials. But as I understand it, the practice has been under important limitations not existing, or at least not stated in this case. It has been usual first to inquire of some witness on the stand as an expert, whether the book to be afterward read from was recognized by experts as a standard authority on the subject. Were this foundation laid, the practice of reading would be shorn of most of its mischief. And so it would if it was subject to the discretion of the court. But the majority opinion unfortunately recognizes no discretion in the court." "It is easy to see what mischief may result from an unrestricted license to counsel to read such books as counsel choose to read, if only they relate to the case. Books may be crazy as well as men, and all sorts of theories relative to responsibility for crime are advocated in books." "It may be suggested that there was in the present case no need of having any expert testify as to the authority of 'Ray's Medical Jurisprudence of Insanity,' because it was so well known. But the principle required it, because courts do not take judicial notice of standard medical or scientific works, and the standard works of to-day may not long continue such, owing to new discoveries and advancing knowledge." The judge then reviews the authorities and concludes that the ruling below was correct. He cites *Luning v. State*, 1 Chandler (Wis.), 178, and *Wade v. De Witt*, 20 Tex. 398, holding that the matter is discretionary in the court. The reasoning of this opinion would tend to make such books competent evidence, but it is strong in opposition to the idea that what is not evidence can be read to the jury.

In *Curtis v. State*, 36 Ark. 284, the proposal was to read to the jury the statute defining the different degrees of murder. The court said: "The court may, in its discretion, permit counsel to read law to the jury in a criminal case, but it is its province to determine whether the law proposed to be read is applicable to the facts of the case. The matter of

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reading law to the jury, as part of the argument, is under the discretion and control of the court, and its rulings in the matter are not subject to review unless its discretion is abused to the prejudice of the accused. *Shackelford v. State*, 33 Ark. 539."

In *Huffman v. Click*, 77 N. C. 55, the court gave an excellent discussion of the subject as follows: "In addressing the jury the counsel for the defendants insisted that the paralysis was caused by hysteria to which the plaintiff was subject. He then proposed to read to the jury extracts from Hammond's Work 'to show that the symptoms testified to by one of the witnesses were common in hysteria, and also for the purpose of showing that this disease was one of the existing causes of paralysis.' The case also states that 'the counsel did not propose to read the book as evidence but as a part of his argument.' His honor refused to allow it to be read, stating that it was not admissible for any purpose. The question is not whether the book was inadmissible for any purpose as stated by his honor within the latter part of his ruling, but whether it was admissible for the purposes indicated by the defendant's counsel to wit: 'to show that the symptoms testified to by one of the witnesses were common in hysteria and that this latter disease was one of the exciting causes of paralysis.' How this could be done without making the book evidence of the truth of the facts contained in it, and also evidence to corroborate the professional opinion of the physician, it is hard to conceive. In such works the argument is based upon the facts stated, and the argument and the facts are so blended that the counsel cannot well get the benefit of the one without the benefit of the other.

"The physician on examination in this case had the right to refresh his knowledge by referring to standard works in his profession, but his evidence must be his own, independent of the works. He cannot read a medical work to the jury; how then can the counsel do it? If this practice were allowed many of our cases would soon come to be tried, not upon the sworn testimony of living witnesses, but upon publications not written under oath. But whether read as evidence or argument the work was inadmissible. The distinction between books that can and cannot be read is now pretty well defined and established.

"It is only necessary now to draw so much of the line of distinction as is applicable in this case and excludes the book proposed to be read. If the work is read it must be to prove the truth of the facts contained in it and the justness of the conclusions which the author draws from those facts. But if medicine is a science (and it claims to be such) it belongs to that class called 'inductive sciences.' Such treatises are based on data constantly shifting with new discoveries and more accurate observation, so that what is considered a sound induction to-day becomes an unsound one to-morrow. The medical work which was 'a standard' last year becomes obsolete this year. Even a second edition of the work of the same author is so changed by the subsequent discovery and grouping together of new facts, that what appeared to be a logical deduction in the first edition becomes an unsound one in the next. So that the same author at one period may be cited against himself at another. The authors of such works do not write under oath; the books themselves are therefore often speculative, sometimes mere compilations, the lowest form of secondary evidence; and as the authors cannot be examined under oath, the authorities on which they rely cannot be investigated, nor their process of reasoning be tested by cross-examination. Such writings are nothing more nor less than hearsay proof of that which living witnesses could be produced to prove. Whart. on Ev., § 665.

"The reasons however for rejecting medical works and others of the inductive class, do not apply to books of what are known as the 'exact sciences,' where the conclusions are reached from fixed, certain, and unvarying data partaking of the character of mathematical demonstration, and by process too abstruse to be explained or even understood in many cases by the witnesses. It is unnecessary to say more of this class of books, as the book in question does not belong to it.

"We have seen that Hammond's Work could not be read as substantive testimony, and it was so held in the case of *Melvin v. Easley*, 1 Jones, 386. Nor could it or any part of it be read as a part of the argument of counsel. It sounds plausible to say, you do not read it as evidence, but that you read and adopt it as a part of your argument. But in so doing the counsel really obtains from it all the benefits of substantive evidence fortified by its 'standard' character. He first proves by the medical expert that the work is one of high character and authority in the profession, and then he says to the jury, 'here is a

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book of high standing, written by one who has devoted his talents to the study and explanation of this special subject of nervous diseases. He expresses my views with so much more force than I can, that I will read an extract from his work and adopt it as a part of my argument.' It is evident that the effect of this manoeuvre is to corroborate the testimony of the medical expert or other witnesses by the authority of a great name testifying, but not under oath, to the same thing as the expert, but with this difference, that the author has not heard the evidence upon which the expert based his opinion.

"The medical expert himself may cite standard authorities in his profession as sustaining his views, and then they may be put in evidence by the opposing side to discredit him, but he cannot read them either as evidence or argument, nor can the counsel offering them. 1 Whart. on Ev., §§ 438, 665, 667; *Commonwealth v. Wilson*, 1 Gray, 337; *Ripon v. Buttle*, 30 Wis. 614; 12 Cush. 193; 1 Greenl. on Ev., § 493, note."

Whatever may be thought of the competency of such books as evidence, we think that on principle, if not by the weight of authority, they cannot be read to the jury, as a matter of course, unless they are first put in evidence.

BOARD OF EDUCATION v. MCLANDSBOROUGH.

(36 Ohio St. 227.)

Constitutional law — statute relieving public officer from liability.

The legislature may relieve a public officer from liability for public moneys that have been stolen from him without his fault.

ACTION to enjoin a tax. The legislature passed an act relieving a school district treasurer and his sureties from liability for school district moneys stolen from the treasurer, and authorizing the school board to lay and levy a fresh tax for the deficiency. The plaintiff had judgment below.

Cunningham & Hollingsworth, for plaintiff in error.

J. M. Estep, for defendant in error.

OKEY, J. In *State v. Harper*, 6 Ohio St. 607, it was settled, that the felonious taking and carrying away the public moneys in the custody of a county treasurer, without any fault or negligence on his part, does not discharge him and his sureties, and cannot be set up as a defense to an action on his official bond. The bond involved in the consideration of this case is not different in legal effect from the bond in Harper's case. In Harper's case however the question presented in this case was in no way involved, that is whether, where such an officer has lost public funds without any

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fault on his part, it is within the power of the general assembly to provide that the loss thus sustained shall be made to rest on the people to whom the money belonged, and not on an unfortunate but blameless officer.

That the taxing power is a legislative power admits of no doubt. *Lima v. McBride*, 34 Ohio St. 338-350. And any limit to this power must be found in the Constitution itself. Without undertaking to enumerate or define those limitations, we are clear that the act in question in this case does not fall within any of them, nor does the act violate a provision common to both State and Federal constitutions against impairing the obligations of contracts. Bonds like this, where the deficit is of the same character as in this case, are prosecuted in the name of the State, *Hunter v. Mercer Co.*, 10 Ohio St. 515, and the legislature undoubtedly has authority to release obligations which could only be thus prosecuted. Indeed it is difficult to fix any limit to the power of the general assembly in this respect, where the funds so lost were raised by taxation, which, as we have said, is clearly a legislative power.

Counsel have cited no case in which such power, under a Constitution like ours, has been denied, and we have found no such case. *People v. Supervisor*, 16 Mich. 254, and *Bristol v. Johnson*, 34 Mich. 123, were placed entirely on a provision in the Constitution of that State which is not contained in our Constitution, and which provision, it was held, forbids such release by the legislature. And the rule referred to in the beginning of this opinion as to civil actions against the officer, where the funds in his hands have been lost without his fault, is stated by Judge DILLON in the same way, but he adds that such officer will not be liable if he has been "relieved from this responsibility by statute." 1 Dill. on Mun. Corp. 296.

Judgment reversed.

STATE V. TELEPHONE COMPANY.

(36 Ohio St. 296.)

Telegraph company — statutory construction — public policy — patent.

Under a statute enacting that telegraph companies shall receive dispatches from and for other telegraph lines, and from and for individuals, and trans-

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mit them with impartiality and good faith, a contract between a telephone company and the owner of telephone instruments providing that the company in the use of the instruments shall discriminate as between telegraph companies, is void as against public policy. (*See note, p. 587.*)

The use of a patented article devoted to public use is subject to control by State legislation where the public welfare demands it.

MOTION for mandamus. The relator, American Union Telegraph Company, is a corporation of New York, doing business in Ohio and elsewhere. The relator, Baltimore and Ohio Railroad Company, is a corporation of Maryland, doing business in Ohio and elsewhere, and using telegraphic facilities furnished by the American Union Telegraph Company. Both relators have offices in Columbus, Ohio. The respondent, Columbus Telephone Company, is a corporation of Ohio, doing business in Columbus. The respondent, Western Union Telegraph Company, is a corporation of New York doing business in Ohio and elsewhere, and having an office at Columbus. The respondent, Bell Telephone Company, is a corporation of Massachusetts, and is the owner of letters patent on the instruments it uses and controls. The American Bell Telephone Company entered into a contract with the Columbus Telephone Company, granting to the latter the use of its instruments, but providing that the Western Union Telegraph Company should perform all telegraphic transmissions in connection with such use. The relators prayed for mandamus that the respondents should put up and maintain a telephone for the accommodation of the relators. The opinion states other facts.

J. H. Collins, for relators.

Matthews, Ramsey & Matthews, for Columbus Telephone Co. and W. U. Telegraph Co.

McILVAINE, C. J. [Omitting a minor inquiry.] Title 2, chapter 4 of the Revised Statutes of Ohio, from section 3454 to section 3470, prescribes the powers and duties of magnetic telegraph companies, and section 3471 of the same chapter provides "the provisions of this chapter shall apply also to any company organized to construct any line or lines of telephone, and every such company shall have the same powers and be subject to the same restrictions as are herein prescribed for magnetic telegraph companies."

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Among the powers conferred upon magnetic telegraph companies is the right to occupy public roads and other public grounds, and the power of eminent domain, and among their duties are the following, as prescribed in section 3462, as amended April 15, 1880, namely: "Every company incorporated or unincorporated, operating a telegraph line in this State, shall receive dispatches from and for other telegraph lines, and from and for any individual; and on payment of its usual charges for transmitting dispatches, as established by the rules and regulations of the company, shall transmit the same with impartiality and good faith, under a penalty of one hundred dollars for each case of neglect or refusal to do so, to be recovered with costs of suit by civil action, in the usual name and for the benefit of the person or company sending or forwarding or desiring to send or forward the dispatch."

This section when construed in connection with section 3471, above quoted, makes it the duty of the Columbus Telephone Company to receive dispatches from and for telegraph lines, by the very words of the statute; but if not, such duty toward the relators and each of them is embraced in the succeeding clause, "and from or for any individual." The word "individual" is here used in the sense of person, and embraces artificial or corporate persons as well as natural. The dispatches so received "from or for," must be transmitted "with impartiality," that is, without discrimination, either in respect to persons or in the time or manner of transmission.

Such being the nature of the duty imposed upon the Columbus Telephone Company by the statute, it cannot shield itself from the performance thereof, by any self-imposed restrictions contained in the stipulations of a contract with the American Bell Telephone Company, by which the right to use the instruments or license of the latter company was acquired. The Columbus Telephone Company was bound to acquire from the American Bell Telephone Company such rights in its instruments and patent (or to provide itself by other means of all such facilities), as were necessary to discharge its duties to the public, as prescribed in the statute; otherwise it had no right to engage in the business of operating a system of telephones to all.

We do not mean to say, that as between the Columbus Telephone Company and the American Bell Telephone Company, the right to control the receipt and delivery of telegraph messages might not

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have been reserved to the latter company ; but we do hold, that no such right could be reserved whereby the relators could be deprived of the use of the system of telephones organized and managed by these telephone companies, either jointly or severally.

And in regard to the American Bell Telephone Company, it is enough to say, after what has already been said in relation to the Columbus Telephone Company, that it cannot be permitted to operate a line or system of telephones, in this State, and in the face of the statute either directly or through the agency of licensees, without impartiality, or in other words, with discriminations against any member of the general public who is willing and ready to comply with the conditions imposed upon all other patrons or customers, who are in like circumstances. And all contracts in contravention of the public policy of this State, as declared in chapter 4 of the Revised Statutes, above referred to, must be declared void and of no effect.

It is claimed that the statute above referred to cannot control or invalidate the contract in question, because the exclusive right to make, vend, and use these telephone instruments is vested by the assignment of letters-patent, under an act of Congress, in the American Bell Telephone Company; and that it is not within the power of a State to impair the right so secured. In our opinion, this statute is not the subject of constitutional infirmity.

While it is true, that letters-patent secure a monopoly in the thing patented, so that the right to make, vend, or use the same is vested exclusively in the patentee, his heirs and assigns, for a limited period, it is not true that a right to make, vend, or use the same in a manner which would be unlawful except for the letters-patent, thereby becomes lawful, under the act of Congress, and beyond the power of the States to regulate or control.

This doctrine is fully discussed and settled in *Jordan v. Overmire of Dayton*, 4 Ohio, 295, and *Patterson v. Kentucky*, 97 U. S. 501. The doctrine of these cases may be stated thus: the right to enjoy a new and useful invention may be secured to the inventor and protected by national authority against all interference; but the use of tangible property which comes into existence by the application of the discovery is not beyond the control of State legislation simply because the patentee acquires a monopoly in his discovery. "The sole operation of the statute is to enable him to prevent others from using the products of his labors without his consent;

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but his own right of using is not enlarged or affected." The property of an inventor in a patented machine, like all other property, remains subject to the paramount claims of society, and the manner of its use may be controlled and regulated by State laws when the public welfare requires it.

It appears to us, as a proposition too plain to admit of argument, that where the beneficial use of patented property, or any species of property, requires public patronage and governmental aid, as for instance, the use of public ways and the exercise of the right of eminent domain, the State may impose such conditions and regulations as in the judgment of the law-making power are necessary to promote the public good.

As respects the Western Union Telegraph Company, we are of opinion that no case has been made which will justify a judgment against it; but as to the respondents, the Columbus Telephone Company and the Bell Telephone Company, the writ of mandamus prayed for should be made peremptory.

Judgment accordingly.

NOTE BY THE REPORTER.—In *State ex rel. American Union Telegraph Co. v. Bell Telephone Company of Missouri*, St. Louis Circuit Court, there was an application for mandamus to compel the defendant to connect the plaintiff's office with its wires, and give it the use of telephonic facilities. The defendant contended that it could not be compelled to do so, because by the terms of its license from the patentee of the invention it was forbidden to connect with any telegraph office or permit any telegraph company to become one of its subscribers. The court observed: "Bearing in mind that the respondent serves the public as a common carrier of messages, not by keeping offices and agents of its own to which the entire public may resort, but by applying instruments to private residences and offices, and thereby enabling its subscribers to communicate directly with each other, it becomes evident that this clause of the contract, if enforced as a valid provision, would compel the respondent to discriminate against a class of individuals or corporations engaged in a particular calling, to the extent of denying them any telephonic facilities whatsoever. In other words, a corporation created under the laws of this State, and endowed with large privileges, among others with the right to appropriate private property (presumptively on the theory that such a corporation is a public servant), is compelled by the natural operation of this provision of the contract to withhold facilities for the transaction of business from one class of citizens which it accords to others. In my judgment, this clause of the contract is indefensible when called in question by any person or corporation injuriously affected thereby. In so far as the contract between the respondent and the patentee compels the former to discriminate against one class of its would-be customers, and to deny them the same privileges and service which it accords to others, the contract is invalid. It is not possible to admit the principle that a railroad, telegraph or telephone company may avoid the performance of any part of the paramount duty they owe to the entire public, by contract obligations which they may enter into, even with the patentee of an invention. If the principle were conceded, it is quite obvious that such corporations might readily avoid the performance of any public duty that became inconvenient or burdensome. It would become possible to discriminate at pleasure both against individuals or classes." "If the relator, owing to the peculiar nature of its business as a telegraph company, shall attempt to make such use of the telephone as the

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respondent seems to anticipate, the question as to the legality of such use can only be tried and determined when the emergency arises and in some appropriate form of proceeding."

In *Louisville Transfer Co. v. Am. Dist. Telephone Co.*, Louisville Chancery Court, it was held that the employment of a telephone company is public, and such a company is bound to serve the public without discrimination. The plaintiffs were proprietors of public omnibuses and carriages and the defendants were a telephone company and also proprietors of public carriages. The defendants were restrained from removing their telephones from the plaintiffs' offices, and from refusing to transact the plaintiffs' telephone business, pursuant to a contract between the parties. The court, EDWARDS, chancellor, said: "The real contention between the plaintiff and defendant is confined to their carriage and coupe services; defendant insisting that as against plaintiff, a rival in that business, it has the right to a monopoly in the use of its own telephonic methods of communicating and receiving orders for coupes; that a mere rival in one branch of its business cannot force it to afford it the facilities which it has provided for another branch of its business. Upon the facts appearing upon the petition and affidavits of plaintiff, it is the opinion of the court that defendant is engaged in two distinct employments—one in operating a telephonic exchange, and the other in operating a carriage or coupe service. Plaintiff and defendant are not rivals in the former business, and as to that part of defendant's business it occupies the same position toward plaintiff as it does toward the rest of the public; that defendant is a quasi public servant, and as such is bound to serve the general public, including plaintiff, on reasonable terms, with impartiality; that defendant is governed by the principles of the law of common carriers. See *Bennett v. Dutton*, 10 N. H. 481; *New England Express Co. v. Maine Central R. R. Co.*, 57 Me. 188; s. c., 2 Am. Rep. 31; *Sandford v. Railroad Co.*, 24 Penn. St. 381; and *McDuffie v. Railroad*, 32 N. H. 447; s. c., 13 Am. Rep. 72; *Munn v. Illinois*, 4 Otto, 113. The principles announced in opinion by Judge THAYER, in *American Union Telegraph Co. v. Bell Telephone Co.*, should determine this controversy. The mere fact that defendant may possess dual powers, and is operating or carrying on two distinct kinds of business, cannot exempt it from the general rules governing such corporations, with reference to the general public; and to determine the rights of the plaintiff, defendant must be considered as a telephone company and as a transfer company. See *Clarton's Admr. v. Lexington and Mt. Sandy R. R. Co.*, 13 Bush, 638. The law must adapt itself to the new subjects that are brought within the range of judicial action. And courts must reason by analogy from things that are settled, in order to establish principles to govern things that are unsettled. 4 Am. Law Reg. (N. S.) 193. The rule that defendant is bound to serve all the public alike, under like circumstances, is the one applied by the court in this case, and plaintiff is a part of the public, and defendant, as to its telephonic business, is a distinct person from itself as a transfer company, so far as the rights of others are to be determined. The rights of plaintiff do not depend upon contract, but the general principles before stated. Defendant had a right to terminate its contract with plaintiff, but as it holds out as the servant of the public, it must act with perfect impartiality toward its customers."

On the other hand, in *American Rapid Telegraph Co. v. Connecticut Telephone Co.*, Connecticut Supreme Court of Errors, February, 1882, the defendant had purchased from a Massachusetts company, owning the patent, the right to use its magnetic telephone system for a certain period, on the condition that it should not permit telegraph companies to use the system unless they had purchased the right of the Massachusetts company. A statute of Connecticut provides that every telephone company shall impartially permit persons and corporations to transmit speech through its wires by its instruments. The plaintiff, not having purchased the right, sued to compel the defendant to permit it to use the system. Held, that the action would not lie. The court said: "The petitioner insists that the respondent has offered its services to the public as a common carrier of articulate speech; that it has thereby made itself the servant of the public, and has subjected itself to the operation of the general law which compels all such servants to serve applicants impartially, regardless of the limitations placed upon its use of the instruments. But the property of the American Bell Telephone Company in its patent is absolute and exclusive: it can rent or sell it in whole or in part; it can refuse to make or use or to allow any one

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else to make or use the telephone described in it; or it can make and sell one and no more, and put such restrictions as it pleases upon the time, place and manner of using that; and it was the privilege of the Connecticut Telephone Company to purchase from it even the most limited right to use one or more of its instruments; and it is not within the power of the court either to enlarge or diminish the purchase. In this respect the position of the Connecticut Telephone Company is quite unlike that of railroad companies which have in the exercise of their respective franchises voluntarily undertaken by contract to put limitations upon the use of property absolutely their own and discriminate in favor of certain applicants for transportation; unlike that of proprietors of grain elevators, who have been declared to be warehousemen, and as such to have brought themselves within the power of the legislature to regulate their tolls and compel them to render impartial service to applicants for storage; and unlike that of railroad companies, which have undertaken to bind themselves by contract not to do on behalf of the public the service, the doing of which was the consideration upon which they received valuable franchises." As to the statutory provision the court said: "The utmost reach of this is to require them to make an impartial use of such rights or privileges as they possess; if their system is carried into effect by instruments which are not the subjects of a patent, and they so conduct their business as to become common carriers of speech, they are to serve applicants with impartiality; or if it is carried into effect by patented instruments, of which patents they are the owners, the same result is to follow; but if it is carried into effect by instruments which are the subjects of a patent which is the property of a resident of another State, and from whom they are able to purchase, not instruments themselves but only a right to the temporary use thereof, subject to conditions and limitations, they are only required to give impartially to applicants the use of the full measure of the right which they have been able to procure."

HARPER V. CRAIN.

(26 Ohio St. 333.)

Contract — wager — rescission — statute.

G. sold and delivered to H. a horse upon his written agreement to pay \$140 one day after the re-election of G. as president of the United States, but conditioned to be void if G. was not re-elected. Before election H. tendered the horse to C. and demanded back his agreement, but C. refused to receive the horse or deliver up the agreement, and H. retained the horse as bailee. G. being re-elected, C. demanded the price, and H. refusing, but being ready and willing to return the horse, C. sued for the value, under a statute prohibiting wagers and permitting such action to be brought by the loser. Held that the transaction was a wager and void; that H. was at liberty to rescind by surrendering the horse; and that he was not liable under the statute unless he had subsequently converted the horse.

ACTION for the value of a horse. The head-note and opinion state the facts. The plaintiff had judgment below.

R. F. Howard and John Little, for plaintiff in error.

E. H. Munger, for defendant in error.

JOHNSON, J. Although exceptions to the charge of the court are not specifically made, yet as we have all the evidence as well as the charge, it is proper to examine it in connection with the evidence, in order to determine whether the verdict and judgment are according to law and evidence. *Marietta & Cincinnati R.R. v. Strader*, 29 Ohio St. 452.

This transaction was a wager, or bet, on the result of an election, and therefore void. *Thomas v. Crouse*, 16 Ohio, 54; *Lucas v. Harper*, 24 Ohio St. 328.

It is a fact, admitted in the pleading, and not controverted by the evidence, that before the election, which was to determine the wager, Harper returned and offered to re-deliver the horse to Crain, but he refused to receive it, because, as he states in his reply, "the defendant had kept said horse as his property for the space of about two months from and after the sale and delivery thereof to him, whereby, and by reason of the fault of the defendant, the said horse had materially depreciated in value, and that the plaintiff had lost the use thereof in his business."

The pleadings thus made up presented, aside from the question of value, but one issuable fact, *i. e.*, whether the plaintiff had the right to refuse to receive back the horse and sue for its value, on the ground that the defendant had converted him to his own use; or rather, whether his excuse for not receiving back the horse, for the reason set up in his reply above quoted, was valid. That the horse was delivered to Harper under a wager contract, and that there was an offer to return, and a refusal to receive, before the election, was admitted by the pleadings.

Upon this state of fact, what were the rights of the parties? The statute prohibits such contracts, and gives a right of action to recover back to the loser. Independent of this statute, there was no remedy for the loser, where the money or property had been delivered, as the law would not lend its aid to a party either in the execution or rescission of such a contract.

The maxim, "*ex turpi causa, non oritur actio*," applies in such cases, and leaves the parties where it finds them. Where property or money was lost, under a wager, prohibited by public policy, or by statute, it was the policy of the law to afford no remedy to the loser, because he was *in pari delicto* with the winner.

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Again, in all cases of contracts prohibited by statute, or which are void as against public policy, the law allows a day for repentance, while the contract remains executory. "He who advances money in consideration of a promise or undertaking to do such a thing, may, at any time before it is done, rescind the contract, and prevent the thing from being done, and recover back the money. "But it would seem obvious, that if he delays rescinding until his rescission is inoperative, and the thing will still be done, although the contract, at the time of the rescission, was in form executory, it should come under the same rule as an executed contract for unlawful purposes." 2 Pars. Cont. 746, note *v*; *Hooker v. De Palos*, 28 Ohio St. 251; *McAllister v. Hoffman*, 16 S. & R. 147.

McAllister v. Hoffman was an action to recover back money in the hands of a stake-holder, deposited as a bet upon an election. After the election, the loser, upon notice to the stake-holder not to pay, the winner brought this action against the stake-holder, to recover it back. There was no statute in Pennsylvania, as in this State, authorizing a recovery back, but there was an act prohibiting such wagers. It is there said, that by narrowing the *locus penitentiae* to the interval between the period of betting and the happening of the contingency, the object of the statute will best be promoted. Within this interval of time, the policy of the law is to allow either party to rescind an unexecuted contract, and to reinstate himself to his original status.

It being an admitted fact, that before the election Harper offered to return the horse and Crain refused to receive it, it follows that this offer was in the exercise of a lawful right to rescind, unless, at the time of such offer, there had been such a conversion of the property as excused Crain from the duty of receiving back the property.

By the clear weight of the testimony, and indeed there is scarcely a shadow of proof to the contrary, the horse was in as good, if not in a better, condition when the offer to return was made, than he was when delivered to defendant in August. It was therefore the duty of plaintiff to surrender the note and take back the horse. His excuse as pleaded, to say nothing of the want of proof to sustain it, for not receiving back the horse, was based in part, if not wholly, on untenable ground. It was, that defendant had had the use of him for about two months as his own, *whereby*, and by reason of the fault of the defendant, and also that the plaintiff had

lost the use thereof in his business. Two of these three reasons, to wit, the plaintiff's loss of use, and defendant's use of the horse for two months as his own, without acts amounting to a conversion, did not deprive the defendant of his right to rescind, nor excuse the plaintiff from his duty to take back the property.

Upon this state of pleading and of fact, the court charged the jury that plaintiff was entitled, under the statute, to recover the value of the horse, unless that right was defeated by the facts stated in the answer.

Notwithstanding the admitted offer to rescind and the refusal to accept, the plaintiff's right to recover the value of the property, as a loser, is assumed by the court, unless defendant, upon whom the burden is cast, by the charge of the court, establishes the truth of the allegation of his answer.

In effect this was telling the jury that the plaintiff might, under the statute, recover, not the property *in specie*, but its value, without also showing that defendant had *converted it to his own use*, and in the face of the offer to surrender the property, and plaintiff's refusal to receive it. This was clearly erroneous.

Lucas v. Harper, 24 Ohio St. 328, was a case somewhat like the present. It was a sale of hogs at nine cents per pound, which were worth less than half that sum, to be paid for when H. G. should be elected. The hogs were delivered under this contract to defendant, who converted them to his own use. After the election and defeat of H. G., an action was brought to recover the market value of the hogs, under the act of 1831, and it was held that the transaction was a wager, and that the person losing might maintain this action against the winner under that act.

The case at bar differs from that in two material points. 1st. In this there is the absence of any proof of conversion, while in that there was an actual conversion, and 2d, in this the contract was rescinded *before* the election, while in that it was not.

Assuming that this action under this statute to recover back the property is maintainable, we think the plaintiff should prove, as he has alleged, that the defendant has converted the property to his own use. There should have been a demand and refusal to deliver, which in law would amount to a conversion, or such an actual conversion as would have rendered a demand useless. Certainly, after defendant had offered to return the property, and the offer was refused, and when he was holding it as a mere bailee for plaintiff,

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with reasonable and ordinary care, as the proof shows, he was not liable for its conversion.

The amended petition was based upon this theory, for it alleges that plaintiff "has disposed of and converted" the horse to his own use. This petition was filed, after the sale of the horse, in March, 1873, as stated in the answer, long after suit brought, and such sale was not made by defendant as owner, but as bailee of Crain. Besides this, the rights of the parties were to be determined as they existed when the action was commenced, in December previous. At that time, there is no pretense that there was anything which, in law or fact, amounted to a conversion. The proof abundantly shows that the horse was then in as good, if not in better, condition than when delivered in August, and that defendant was at all times not only ready and willing to deliver back the property, but urgent that plaintiff should receive it, and that the latter insisted on his keeping it, and paying the agreed price.

To allow the plaintiff to recover the value of the horse upon the conceded facts of this case, would in effect enable him to enforce a contract which is null and void, and that too after it had been rightfully rescinded, without showing any act of defendant which, in law or fact amounted to a conversion.

It is a matter of serious doubt whether such an action can be maintained under the statute, where the wager is withdrawn or the contract is rescinded before the contingency has happened, which determines it; but assuming, for the purpose of this case, that it can, we hold, that where, between the making of the contract and the happening of the contingency, either party elects to rescind, and offers to deliver back the money or property, which offer is refused, he is not liable for its *value* under the statute, without a showing that before the commencement of the action, he has, by a refusal to deliver on demand, or by some other act amounting to conversion, made himself liable for conversion of the property.

We pass without consideration all other questions appearing upon the record, and reverse the judgments below, on the ground that they are contrary to the law and the evidence.

FRANKLIN BANK V. COMMERCIAL BANK.

(86 Ohio St. 350.)

Corporation — power to hold stock in another corporation.

The parties were banking corporations organized under a law forbidding any bank to hold or purchase stock in any other corporation except to prevent loss upon a debt previously contracted in good faith. The plaintiff loaned money to the defendant's president individually, and took as security a certificate of shares of the capital stock of the defendant belonging to him. Subsequently the plaintiff presented the certificate to the defendant, and demanded a transfer of the shares on the defendant's books. This being refused, the plaintiff sued for conversion of the stock. *Held not maintainable.*

ACTION for conversion of stock. The head-note and opinion show the facts. The defendant had judgment below.

Healy & Brannon and Lincoln, Smith & Stevens, for plaintiff in error.

Matthews, Ramsay & Matthews, for defendant in error.

BOYNTON, J. We are met at the threshold of the case with the inquiry, whether an action will lie in favor of the plaintiff against the defendant for refusing to transfer, on the books of the defendant, to the name of the plaintiff, the two hundred shares of the capital stock of the defendant, represented by the certificate issued to Foote, and by him pledged to the plaintiff as security for the loan obtained. Such refusal to so transfer said stock, and an alleged consequent conversion of the same by the defendant, constitute the gravamen of the plaintiff's action. The 12th section of the act under which the two corporations were organized, and from which they derived their powers, expressly provided that no banking company organized under its provisions should be the holder or purchaser of any portion of its capital stock or of the capital stock of any other incorporated company, unless such purchase should be necessary to prevent loss upon a debt previously contracted in good faith, on security which at the time was deemed adequate to insure the payment of such debt, independent of any lien upon such stock. 1 S. & C. 170, § 12. And by section 29 it was provided, that all

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the rights, privileges and franchises which the company derived from the act should be forfeited, if the directors of the company should knowingly violate, or permit any of the officers or agents of the company to violate, any of the provisions of the act. That the stock in the present case was pledged or received to secure a precedent loan is not claimed.

There would seem to be little doubt, either upon principle or authority, and independently of express statutory prohibition of the same, that one corporation cannot become the owner of any portion of the capital stock of another corporation, unless authority to become such is clearly conferred by statute. *Mutual Savings Bank, etc.*, v. *Meriden Agency*, 24 Conn. 159; *Franklin Company v. Lewiston Savings Bank*, 68 Me. 43; *Central Railroad Company v. Collins*, 40 Ga. 582; *Sumner v. Marcy*, 3 W. & M. 105. Were this not so, one corporation, by buying up the majority of the shares of the stock of another, could take the entire management of its business, however foreign such business might be to that which the corporation so purchasing said shares was created to carry on. A banking corporation could become the operator of a railroad, or carry on the business of manufacturing, and any other corporation could engage in banking by obtaining the control of the bank's stock. Nor would this result follow any the less certainly, if the shares of stock were received in pledge only to secure the payment of a debt, provided the shares were transferred on the books of the company to the name of the pledgee. A person in whose name the stock of the corporation stands on the books of the corporation, is as to the corporation a stock-holder, and has the right to vote upon the stock. *State ex rel. White v. Ferris*, 42 Conn. 560; *Ex parte Willcocks*, 7 Cow. 402; *In re Barker*, 6 Wend. 509; *Hoppin v. Buffum*, 9 R. I. 513; *Field on Corp.*, § 69.

Hence if the plaintiff appeared on the books of the defendant as the transferee or owner of the two hundred shares of stock represented by the certificate to Foote, it would have the right to vote upon the stock at all meetings of the stockholders of the defendant; and it would only be necessary for it to procure in pledge, as security for money loaned, a majority of the shares of the capital stock of the Commercial Bank, in order to obtain full control of its affairs, and take charge of its banking operations. This would not only be exercising powers granted to the plaintiff neither expressly nor by implication, but those which are clearly opposed to the manifest

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spirit and intent, if not to the language, of the statute. This court has uniformly adhered to the doctrine announced in *Strauss v. Eagle Ins. Co.*, 5 Ohio St. 59, that corporations have such powers, and such only as the act creating them confers; and are confined to the exercise of those expressly granted, and such incidental powers as are necessary to carry into effect those specifically conferred. *Bank of Buffalo v. Toledo F. & M. Ins. Co.*, 12 Ohio St. 601. This principle has recently been most emphatically asserted, both by the Supreme Court of the United States in *Thomas v. Railroad Co.*, 101 U. S. 71, and by the House of Lords in *Ashbury Railroad Carriage and Iron Co. v. Riche*, L. R., 7 H. L. 653. It was claimed in argument in both of these cases, that a corporate body may do any act which is not either expressly or impliedly prohibited by its charter; although it was conceded, that a stockholder might enjoin the act where it was not authorized, either expressly or by implication and that the State, by proper process and proceedings, might forfeit the charter. But it was held in the first case that the powers of a corporation, organized under a legislative enactment, are such only as the statute confers, and that the enumeration of them implies the exclusion of all others; and by the second case that the contract sued on, being of a nature not included in the memorandum of association, was *ultra vires*, not only of the directors, but of the whole company and which the whole body of shareholders was incapable of ratifying.

Notwithstanding the rule thus prevailing, the act under which both the plaintiff and defendant were organized did not leave the right or power of the plaintiff to acquire the title to shares of stock in another corporation, to be determined alone upon the principle of construction which the rule above stated adopted. The right to deal in shares of stock in other corporations is not only not found among the enumerated powers which the act confers upon banks organized under its provisions, but the power in language of the most undoubted import is denied, and its exercise expressly prohibited. It therefore follows that the refusal of the defendant to permit the transfer upon its books to the plaintiff of the two hundred shares of its stock, violated no right of the plaintiff and consequently created no liability on the part of the defendant. Such refusal did not amount to a conversion of the stock.

Its action in refusing the transfer was but the denial of any right by the plaintiff to be placed in a position to interfere and partici-

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pate in the control and management of its internal affairs. To the claim of the plaintiff, that it was the duty of the defendant to make the transfer when the same was demanded, and leave the State to impose the penalty of forfeiture on the plaintiff for a violation of its charter, we do not assent. The cases of *Union National Bank v. Matthews*, 98 U. S. 621, and *Jones v. Guaranty and Indemnity Co.*, 101 id. 622, and the cases therein cited, do not support such proposition. The principle of those cases is, that where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but voidable only and that the sovereign alone can object. That the conveyance is valid until assailed in a direct proceeding instituted for that purpose. But they neither by the principle maintained, nor by the reasoning advanced in support of it, sanction the doctrine that one corporation may buy up the stock of another, and thereby enable itself to interfere with the internal management of its affairs, especially where the power to do so is expressly prohibited by its charter.

In our opinion the petition stated no cause of action against the defendant, and hence laid no foundation for a judgment in favor of the plaintiff. That the plaintiff may have acquired rights by the pledge received from Foote, to such interest in the bank as said certificate of stock represented, is quite true. But what that interest is, if any, we cannot in the present case determine.

Judgment affirmed.

 IRON RAILWAY COMPANY V. MOWERY.

(26 Ohio St. 418.)

Negligence — presumption of — contributory — sudden peril.

In case of collision of railway trains a presumption of negligence arises against the carrier.

A railway passenger is not guilty of negligence in attempting to leave a car, under a reasonable belief that by so doing he will escape injury from an impending accident, where he is injured by the company's negligence in so doing, although he would have escaped had he remained. (*See note, p. 599.*)

ACTION for personal injury by negligence. The opinion states the points. The plaintiff had judgment below.

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O. F. Moore and Neal & Cherrington, for plaintiff in error.

Leet & Hamilton and W. A. Hutchins, for defendant in error.

BOYNTON, J. This is a petition in error by the plaintiff, to reverse the judgment of the District Court for wrongfully affirming the judgment of the Court of Common Pleas; and the judgment of the Court of Common Pleas for alleged error in the charge of the court to the jury; and a cross petition in error by the defendant in error to reverse the finding of the District Court that the judgment rendered on the verdict was excessive, and that consequently the judgment ought to be reversed, unless he, the defendant in error, would remit the amount of the judgment in excess of \$1,500.

Whether a presumption of negligence arises, in all cases, against a railroad company, from the mere fact that an accident has occurred from which a passenger receives an injury while being carried over the road of the company, is a question not arising in the present case, and therefore is not determined; but where an injury results to a passenger from a collision of the trains of the company, we have no doubt that a *prima facie* presumption of negligence arises against the company, and that unless the company relieves itself from liability, by showing that the injury did not result from its carelessness, or by showing contributory negligence upon the part of the passenger, judgment should be rendered against it. To this effect the authorities seem uniform. *Stokes v. Saltonstall*, 13 Pet. 181; *Laing v. Colder*, 8 Barr. 483; *Christie v. Griggs*, 2 Campb. 79; *Carpus v. London & Brighton Railway Co.*, 5 Ad. & El. (N. S.) 747; *Holbrook v. Utica & Schenectady R. R. Co.*, 2 Kern. 236; *Curtis v. Rochester & Syracuse R. R. Co.*, 18 N. Y. 534-542.

We therefore think the court did not err in charging the jury that the burden of proof was on the defendant below, to establish the fact that the injury did not result from its negligence.

Nor do we think the court erred in saying to the jury, that the plaintiff's right to recover was not affected by his having contributed to his injury, unless he was in fault in so doing. The only act of the plaintiff which is alleged to have contributed to his injury was the leaving of his seat in a moment of excitement, and going forward to the platform of the car, which he had just reached when the injury was received. In respect to the attempt to leave the car, the jury found specially, that in so doing the plaintiff believed, upon

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good grounds for his belief, that he could better avoid the danger, and save himself and wife from injury. This finding established the fact, that the plaintiff's act in leaving the car, although contributing to the injury, was not a negligent act, and hence if the language of the charge was at all objectionable, no prejudice resulted from it to the defendant.

[Omitting minor inquiries.]

Judgment affirmed.

NOTE BY THE REPORTER. — To the same effect, *Twomey v. Central Park, etc., R. Co.*, 69 N. Y. 166; 35 Am. Rep. 163, and note, 164; *Wilson v. North Pacific R. Co.*, 26 Minn. 378; s. c., 37 Am. Rep. 386, note.

The like doctrine was declared in *Gumz v. Chicago, St. Paul & Minneapolis Ry. Co.*, 52 Wis. 673, where it was held, that where there are two or more lines of action, any one of which may be taken, and a party, with ordinary skill, in the presence of imminent danger, is compelled immediately to choose one of them, and does so in good faith, the mere fact that it is afterward ascertained by the result that his choice was not the best means of escape, is not sufficient to charge him with negligence. So in *Schultz v. Chicago & Northwestern Ry. Co.*, 44 id. 638, the court said: "It is probably true that had the plaintiff gone upon the east side of the track, or into the open space in the side of the coal house, he would have escaped injury. But it cannot be held that he was absolutely guilty of negligence because he failed to take one of these methods of escape. He was acting on short notice in the presence of imminent danger. He had no time to calculate chances, or to deliberate upon the means of escape. He was compelled to act at once, and it would be most absurd and unjust to hold him negligent because the instinct of self-preservation did not suggest the most effectual method of escape from the peril. The jury might well find (as they did) that he was not negligent merely because there was a better way of escape than that which he chose."

STATE V. SHANNON.

(36 Ohio St. 423.)

Statute — construction — killing game on lands — navigable river.

A statute imposed a penalty for killing certain birds on inclosed and improved lands, or any lands whose boundaries "are defined by stakes, posts, water courses, ditches, or marked trees," and whose owner has given verbal or written notice not to hunt thereon; or on lands on which a board is conspicuously set up with notice that no shooting or hunting is allowed on such premises. *Held*, to apply to the channel of a navigable river, the land owner having put up the statutory notice on the shore.

CONVICTION of unlawful killing wild ducks, reversed by the Probate Court. The head-note and opinion show the facts.

Lemmon, Finck & Lemmon, and W. J. Boardman, for plaintiff.

Everett & Fowler, for defendant.

MCLVAINE, C. J. This cause and *June v. Purcell*, decided at this term and reported 36 Ohio St. 396, having a question in common, were considered together. In that case it was held, that the title of a riparian owner of land, bounded by a navigable stream in this State, extended to the middle or thread of the stream. It follows upon the principle announced in that case, that the *locus* of the offense alleged in this, though upon the surface of a navigable stream, was within the boundaries of Tindall's land, and was embraced within the literal meaning of the notice, "No shooting or hunting allowed on these premises."

It is true however that the right of Tindall to so much of his lands as was covered by the waters of the Sandusky river, the same being a navigable stream was not exclusive, but subject to the right of the public to use the same as a highway, so that the entry of Shannon within the boundaries of Tindall's premises, to wit, within the limits of this public highway, did not *per se* make him a trespasser; and clearly an action against him for trespass *quare clausum fregit*, could not be maintained. Hence it was claimed by defendant, that his conviction was wrong, because, as is claimed, this section of the statute applies only to persons who wrongfully break and enter the close of another contrary to his expressed will.

The provisions of the statute were not intended to punish trespassers *quare clausum fregit*, merely because they may have been guilty of a trespass; but were intended to punish the act of killing, shooting at, or pursuing game on the lands of another against which notice may have been given as provided in the statute; so that a person rightfully on the premises of another may commit the unlawful act, as well as one who commits a trespass by entering upon the premises.

It seems to us that whatever change this statute may have made in respect to the law in relation to trespass on real property, the main purpose of the legislature was to confer upon the owner of lands within this State the exclusive right to hunt and kill the designated game upon his own premises, and to protect him in such right, provided he complies with the prescribed conditions in regard to notice.

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And with regard to notice if the lands be "inclosed and improved," or if the boundaries be "defined by stakes, posts, water-courses, ditches or marked trees," verbal or written notice "not to hunt thereon," will bring the offender within the operation of the statute. And where a water-course, for instance a navigable stream, constitutes a boundary, it is the opinion of a majority of the court, that all persons who have received verbal or written notice not to hunt upon the lands of the owner, are bound to take notice that his lands extend to the middle of the water-course, if such be the fact.

But if the lands be not "inclosed and improved," or if they be not "defined by stakes, posts, water-courses, ditches or marked trees," as well as where they are so defined, the owner may bring himself and his lands within the protection of the statute by setting up in some conspicuous place thereon, "a board inscribed in legible English characters thus, 'No shooting or hunting allowed on these premises.'" And in such case all persons engaged in shooting at, killing or pursuing the designated game, must take notice, not only of the statute, but of the setting up of such board and also of the extent or boundary of the lands on which the same is set up. And in respect to this notice, it makes no difference whether the lands or any part thereof be covered by water or not.

It is claimed however that this statute was not intended to protect lands covered by the waters of a navigable river. A majority of the court can see no grounds upon which lands covered by navigable streams should be excluded. They are as much the subject of private ownership as unnavigable streams. There is no distinction between them made by the terms of the statute. True, navigable streams in this State are declared to be public highways; but the right to use a public highway is not abridged by protecting the owner of the fee in the exclusive right of killing game therein. Travel and commerce are not thereby hindered. And as the power of the legislature to protect game, or the exclusive right of the owner of land to kill the same on his own premises, is as ample over land covered by water, whether navigable or unnavigable, as it is over dry land, and as there is no attempt to distinguish between them in this statute, we must hold that all alike are within the protection of this statute.

Exceptions sustained.

WHITE, J., did not concur. He was of opinion that the statute, being penal, must be strictly construed, and that it did not embrace game found upon the open public highways.

ANDERSON v. CARY.

(26 Ohio St. 506.)

Will — absolute devise — subsequent limitation.

Lands being devised to the testator's sons, subject to the right of the testator's widow to one-third of the rents and profits during widowhood, and upon condition that the devisees shall not sell within a specified time, nor mortgage or incumber the lands; held that the devise is absolute and the conditions are void.*

ACTION to subject land to liens. The defendant had judgment below.

Dirlam & Leyman, for plaintiff.

Harrison, Olds & Marsh, for defendant.

MCLIVAIN, J. The decision of this case depends on the construction and effect to be given to the last will and testament of George W. Cary. The question to be decided is, did the plaintiff, by his mortgage from Thomas C. Cary, or by his levy upon the same premises, acquire a lien thereon? The plaintiff claims that the interest or estate of Thomas C., devised to him in the eighth item of his father's will, as to the farm on which the testator resided, was subject to a lien under both the mortgage and execution; and that the subsequent sale of this interest or estate, by Thomas to Charles, did not displace the lien either of the mortgage or the levy. These claims of the plaintiff are contested by Charles. What then was the true intent of the testator? And what the force and effect of this devise?

The provisions of the will which at all affect the question before us are as follows:

"Item Fourth.—I give and bequeath to my beloved wife, Mary Elizabeth, the sum of six hundred dollars, to be paid out of my personal estate, one hundred dollars of the same to be paid over to her out of the first moneys collected by my executor.

"Item Fifth.—I give and bequeath to my two sons, Thomas C. Cary and Charles Lincoln Cary, the residue of moneys and the

* To same effect, *Rona v. Meter* (47 Iowa, 807), 29 Am. Rep. 428.

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proceeds of my obligations after giving the legacies aforesaid, the same to be divided equally between them, share and share alike.

"Item Sixth.—The balance of my personal estate, consisting of personal property, farming implements, stock, cattle, sheep and all other property, personal, except one top buggy and such surplus of grain on hand as shall not be needful for the purposes of the farm, which are to be sold by my executor, I give and bequeath to my wife aforesaid, and to my children before named for the purposes of carrying on my farm, until my oldest son, Thomas C. Cary, arrives at full age, they, the said family, to use the said property in common for the purposes of carrying on said farm and enjoying the proceeds of the same, and when my oldest son arrives at the age of majority, then I desire that my said daughter, Mary Elizabeth, shall sell her interest in the said property so held in common to my said wife and sons, before named. Then the said Mary to have for her said interest in said last named property the appraised value of such property as has been appraised and such property as has been accumulated from said farm during said period, prior to the said majority of said Thomas, to be equally divided, and the said Mary Elizabeth to be paid such amount for her interest as shall be agreed upon between them, she to sell to them, the said sons and my said wife, her interest in said property as aforesaid.

"Item Seventh.—I give and bequeath to my said wife all my household and kitchen furniture, beds, bedding of every kind whatever, and when my said son Thomas shall have arrived at the age of majority as aforesaid, from and after that time I give and bequeath and so direct that my said wife shall have in lieu of dower one-third of the rents and profits of the farm on which I now reside in Green township, aforesaid, as long as my said wife shall remain my widow, and in the event of her marriage then I order and direct that she shall forfeit her said dower as aforesaid, and in lieu thereof I direct that my two sons, Thomas and Lincoln, shall pay to her the sum of twenty-five hundred dollars, one thousand of which shall be paid within sixty days after such marriage and the balance in three equal annual payments without interest. This last item and the six-hundred dollar item and the former provisions made in the foregoing specifications are to be in lieu of all her dower in all my real estate, including three hundred and twenty acres of land I own in the State of Iowa.

"Item Eighth.—I give and bequeath the farm on which I now

live, of two hundred and eighty-five acres, to my two sons, Thomas and Lincoln, upon the following conditions : 1. I direct that they, the said sons, shall not be allowed to sell and dispose of said farm until the expiration of ten years from the time my son, Charles Lincoln, arrives at full age, except to one another, nor shall either of my said sons have authority to mortgage or incumber said farm in any manner whatsoever, except in the sale to one another as aforesaid. I also give and bequeath to my two sons aforesaid, two hundred and forty acres of land lying in the south-east corner of Fayette county, Iowa, which I received by deed from Richard Probert, and the same is now on record in said county ; also eighty acres of land in Chickasaw county, Iowa, which I received by deed from A. H. Crawford."

What estate in the home farm did the testator intend, by the eighth item, to give to his sons ? By section 55 of the wills act of 1852, in force when this will was made, it was provided, "every devise of lands, tenements and hereditaments, in any will hereafter made, shall be construed to convey all the estate of the devisor therein, which he could lawfully devise, unless it shall clearly appear by the will that the devisor intended to convey a less estate." The estate of the devisor in these lands was an absolute fee simple. By other provisions in this will, it is clear that the testator intended, that from the majority of Thomas, his widow, so long as she remained a widow, should have one-third of the rents and profits of said farm. Whether the right thus given to the widow was an interest in the land, or an interest in the rents and profits as such, it is quite clear to our minds that the fee simple absolute, subject to the right of the widow, passed to the sons, as fully and amply as the testator "could lawfully devise" it. It is true, the testator coupled with the devise the words : "Upon the following conditions : I direct that they, the said sons, shall not be allowed to sell and dispose of said farm until the expiration of ten years from the time my son, Charles Lincoln, arrives at full age, except to one another, nor shall either of my said sons have authority to mortgage or incumber said farm in any manner whatsoever, except in the sale to one another as aforesaid," but by these conditions (so nominated) we do not understand that the testator intended a forfeiture upon breach; there is no limitation over in favor of any one; and if a forfeiture for the benefit of his heirs was intended, the devisees, being two of his three heirs, would each have inherited a third part; so that as

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heir of the testator, Thomas C. had full power to charge one-third of the land by mortgage to the plaintiff. But there is no indication in the will, or in the circumstances of the testator, that he intended, in any event, to die intestate as to this property; while on the other hand, it seems clear to us that the testator intended, in all events, that his sons should take this farm, subject to the rights given to their mother, to have and to hold the same to them and their heirs forever. Instead of giving to his sons an estate in the land less than a fee simple, his intent and purpose was to give them the fee simple, but to eliminate therefrom its inherent element of alienability, for a limited period, or to incapacitate his devisees, although *sui juris*, from disposing of their property for the same limited period, to wit: until the younger should arrive at thirty-one years of age — each and both of which purposes are repugnant to the nature of the estate devised.

By the policy of our laws, it is of the very essence of an estate in fee simple absolute, that the owner, who is not under any personal disability imposed by law, may alien it or subject it to the payment of his debts at any and all times; and any attempt to evade or eliminate this element from a fee simple estate, either by deed or by will, must be declared void and of no force. *Hobbs v. Smith*, 15 Ohio St. 419.

Of course, we do not deny that the owner of an absolute estate in fee simple may by deed or by will transfer an estate therein less than the whole, or may transfer the whole upon conditions, the breach of which will terminate the estate granted, or that he may create a trust whereby the beneficiary may not control the corpus of the trust, or even anticipate its profits. But as we construe this will, nothing of the kind has been here attempted. The attempt here was to fasten upon the estate devised a limitation repugnant to the estate, which limitation, and not the devise, must be for that reason declared void.

It is contended on behalf of defendant, Charles L. Cary, that by this devise an estate in trust, until the younger son should arrive at the age of thirty-one, was created for the benefit of the widow and children of the testator. That such was the effect of the so called "conditions," when construed in connection with other clauses of the will. We do not so understand the will.

When the elder son, Thomas, arrived at age, the daughter ceased to have any right whatever in the devised premises.

The right of the widow to one-third the rents and profits of the farm was not affected by the arrival of Charles at thirty-one years of age, and did not affect the absolute character of the devise to the sons. If she took during widowhood one-third of the lands, the sons took a vested remainder in that portion, and a present vested estate in the other two-thirds. If her right was to rents and profits as such, and the same was made a charge upon the lands, the estate of the sons nevertheless vested in them and for their own benefit, subject to the incumbrance. The relation of trustee and *cestui que trust* existed between them in no proper sense. The grantees of the sons would have stood in the same relation to the widow. No relation of personal confidence or trust was created, but one growing out of property rights alone—strictly legal rights. Whatever may have been the desire of the testator as to his widow remaining on this farm after the majority of the elder son, it is quite clear that the rights of the devisees were not made to depend on that event. The personal relations of the members of his family were not provided for after the arrival of Thomas at age, but their property rights, respectively, were defined; and the rights of neither were subjected to the control or supervision of the other. There was no trust created.

If we could find in this devise a trust in favor of the widow until Charles should arrive at thirty-one years of age (and certainly there was none before, if not after), so that no absolute estate vested in the sons previous to the termination of such trust estate, or if we could find a condition which prevented the vesting of the fee for such limited period, or a condition subsequent upon the happening of which the estate devised could be defeated, a different conclusion, no doubt, would be reached.

But the case before us is the devise of an absolute fee, with a clause restraining the alienation and incumbering of the estate for a limited period, intended, no doubt, for the protection of the devisees, who alone are interested in the estate devised. In holding that such restraint is repugnant to the nature of the estate devised, and is void as against public policy, which in this State, in the interest of trade and commerce, gives to every absolute owner of property, who is *sui juris*, the power to control and dispose of such property, and subjects the same to the payment of his debts, we are fully aware of the fact that many authorities may and have been cited to the contrary. Others however support the view we have

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taken, but I shall not attempt either to review or reconcile the cases, being content to rest the decision upon what we conceive to be sound principle and sound policy. The owner of property cannot transfer it absolutely to another, and at the same time keep it himself. We fully admit that he may restrain or limit its enjoyment by trusts, conditions or covenants, but we deny that he can take from a fee simple estate its inherent alienable quality, and still transfer it as a fee simple.

Decree for plaintiff.

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(86 Ohio St. 517.)

Marriage—married woman's sale of business and good-will and covenant not to carry on business.

A married woman selling her separate stock of millinery goods and the good-will of the business, may bind herself by her engagement not to carry on that business at that place or within such a distance as would interfere with it.

ACTION for injunction. The opinion states the facts. The plaintiff had judgment below.

Nichols & Davis, for plaintiff in error.

Frazier, Griffith & Griffith, for defendant in error.

BOYNTON, C. J. The principal question arising in the case is, whether the good-will of the business in which the plaintiff in error was engaged at the date of the contract sued on, constituted a part of her separate estate. That she in terms, and for an entire consideration, sold her business and the good-will thereof, including her stock in trade and of which business and stock she was sole owner, and engaged not to carry on the millinery and dress-making business in or near the town of Felicity, are both distinctly averred.

That she has engaged in said business in violation of said agreement is admitted. And it is not doubted, that had she been sole and unmarried when the contract was entered into, the stipulation not to re-engage in the business in the town of Felicity, or so near

thereto as to interfere with the business, would have been perfectly valid. *Lange v. Werk*, 2 Ohio St. 519. But it is contended that while she was the separate owner of the goods and business sold, the good-will of such business constituted no part of her separate estate. The statute provides that, "any personal property including rights in action, belonging to any woman at her marriage, or which may have come to her during coverture by gift, bequest or inheritance, or by purchase with her separate money or means, or be due as the wages of her separate labor, or have grown out of any violation of her personal rights, shall together with all income, increase and profits thereof, be and remain her separate property, and under her sole control." 68 Ohio L. 48. This provision is very comprehensive. Its object was to cut off the common-law rights of the husband to the personal estate of the wife, whether choses in action or choses in possession, unless reduced to his possession with the express assent of the wife. That the good-will of a business is a species of personal property is well settled. In *Wedderburn v. Wedderburn*, 22 Beav. 84, it was said by the master of the rolls, that "The good-will of a trade, although inseparable from business, is an appreciable part of the assets of a concern, both in fact and in the estimation of a court of equity." Judge STORY defines it as "an advantage or benefit which is acquired by an establishment, beyond the mere value of the capital, stock, funds or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices." STORY on Part., § 99. In *Lindley on Partnership*, 842, the author commenting on the meaning of the term good-will, says that "it is generally used to denote the benefit arising from connection and reputation, and its value is what can be got for the chance of being able to keep that connection and improve it. Upon the sale of an established business its good-will has a marketable value, whether the business is that of a professional man or of any other person." In *Smith v. Everett*, 27 Beav. 446, Sir JOHN ROMILLY says, "I entertain no doubt that if persons carry on business and one of them dies, a share in the good-will, where it is of any value at all, forms part of the estate of the deceased partner." These

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citations are sufficient to show that the good-will of a trade or business, when connected with it, is property. As was said in *Wedderburn v. Wedderburn, supra*, "it is a portion of the subject-matter which produces profits." It follows therefore that the good-will of the business sold by the plaintiff in error was as fully owned by her as a part of her separate property, and as much the subject of sale, as was the stock of goods. This being so, the law gives the same remedy against her for the enforcement of the agreement as if she were unmarried. Section 28 of the Code, as amended March 30, 1874, provides, that if a married woman be engaged as owner or partner in any mercantile or other business, and the cause of action grows out of, or concerns such business, she may sue and be sued alone; and that in all cases where she may sue or be sued alone, the like proceedings shall be had, and the like judgment rendered and enforced, in all respects, as if she were an unmarried woman. Here the plaintiff in error was engaged in business as owner, and business of a mercantile character, and the cause of action grew out of such business. The rule of the statute therefore applies, that requires the same judgment to be given as if she were sole and unmarried. *Patrick v. Littell*, 36 Ohio St. 79. That an injunction is the proper remedy in such case is settled by a uniform current of authority. *Millington v. Fox*, 3 Myl. & Cr. 338; *Catt v. Tourle*, L. R., 4 Ch. App. 654; *Whittaker v. Howe*, 3 Beav. 383; *Hall v. Barrows*, 33 L. J. Ch. 204; *Harrison v. Gardner*, 2 Mad. 198; *Partridge v. Menck*, 2 Barb. Ch. 101; Leake Dig. Law of Cont. 1133. The consideration paid for the stock of goods and the good-will of the business was entire and indivisible, and the difficulty of ascertaining the extent of the injury, or the value of the good-will of the business, has led courts of equity to interfere by injunction for the protection of this description of property, from a very early day. As was said in *Leather Cloth Company, Limited, v. American Leather Cloth Company, Limited*, 4 De G., J. & S. 136, "the court interferes by injunction, because that is the only mode by which property of this description can be effectually protected." The right to relief in equity rests upon the inadequacy of the law to afford the remedy necessary to protect the party in the enjoyment of the right about to be violated. The defendant in error having succeeded to the rights of the purchasers under the contract in suit, is, by the express terms of the contract, entitled to the benefit of the plaintiff's promise not to engage in the business,

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and is consequently entitled to the same relief that a court of equity would have afforded to those from whom her rights were acquired.

Judgment affirmed.

FIRST NATIONAL BANK v. FOWLER.

(36 Ohio St. 534.)

Negotiable instrument — transfer by indorsement — evidence — diversion.

A note payable to the order of "myself", signed by two, and placed by one in the hands of the other to be negotiated for his own benefit, may be transferred by indorsement by that other alone; parol evidence is competent to show the circumstances; and it makes no difference that the maker not indorsing was surety, and that the transferee knew that fact.

ACTION on a promissory note. The opinion shows the facts. The defendant had judgment below.

E. B. Taylor, for plaintiff in error.

G. M. Tuttle, for defendants in error.

OKEY, J. On the trial of this case the testimony was quite conflicting. We do not find it necessary to express any opinion as to the preponderance of the evidence. Of course the plaintiff in error was entitled to recover, if Fowler and Humiston, at the time they executed the note sued on in this case, knew the terms upon which the note of Tyler and Fowler was held. Equally clear it certainly is, that the plaintiff in error was not entitled to recover if it concealed from the defendants in error the terms upon which it held that note, and thereby induced the execution of the note here in suit. The question is as to the liability of the defendants in error upon the assumption that without their fault, or the fault of the plaintiff in error, they were ignorant of those terms. In that case their liability should be measured by the liability of Fowler on the note executed by himself and Tyler. The requests for instructions to the jury, the refusal to charge as requested, and the charge given, in connection with the tendency of certain testimony set forth in the statement of the case, fairly present the question as to the liability of Fowler on the Tyler-Fowler note in the latter view, and

require us to say whether the action of the court in that respect was or was not erroneous.

The note executed by Tyler and Fowler was what is known as an irregular instrument. Byles on Bills (6th Am. ed.) *90 ; 1 Dan. on Neg. Inst., §§ 128, 148. Although signed by both of them, its terms are, "I promise to pay to the order of myself one thousand dollars." Where a note signed by two or more persons is payable to the order of one of them, it becomes effectual when he writes his name upon the instrument and puts it in circulation. If it is payable, in terms, to the order of two of the makers, the same thing must be done by both of them in order to vest in the holder a legal title. A note payable to the maker's own order is wholly void until indorsed by him and put in circulation, but it becomes by such transfer a valid promissory note in the hands of a *bona fide* holder, and is, in effect, payable to bearer.

The only indorsement made upon the note of Tyler and Fowler was that made by Tyler by writing his name on the back of the instrument. Was the court warranted in saying to the jury, that "in order to transfer the legal title of the note, as commercial paper, the note should have been indorsed by both Tyler and Fowler?" In our opinion this question must be answered in the negative upon three grounds.

First. Where a note, the terms of which are, "I promise to pay," is signed by more than one person, it may be read, "We or either of us promise to pay." *Wallace v. Jewell*, 21 Ohio St. 163 ; s. c., 8 Am Rep. 48. Here the instrument is signed by two persons, and its language is, "I promise to pay to the order of myself one thousand dollars." No greater violence is done to language by reading it, "We or either of us promise to pay to the order of ourselves or either of us," than was done in *Wallace v. Jewell* ; and we think where such interpretation is in harmony with what seems to have been the intention of the parties, the instrument may be so read. *Conner v. Routh*, 7 How. (Miss.) 176 ; *Boyd v. Brotherson*, 10 Wend. 93 ; *Pearson v. Stoddard*, 9 Gray, 199 ; *Higley v. Newell*, 28 Iowa, 516.

Second. Parol evidence is inadmissible to vary the terms of a promissory note ; but where the instrument is of the class we are now considering, parol evidence may be admitted to explain it. *McCrary v. Caskey*, 27 Ga. 54 ; *Taylor v. Strickland*, 37 Ala. 642 ; *Kelsey v. Hibbs*, 13 Ohio St. 340. "If you can construe an in-

strument by parol evidence, where that instrument is ambiguous, in such manner as not to contradict it, you are at liberty to do so." PARKE, B., in *Goldshede v. Swan*, 1 Welsby, H. & G. 154, 158. And Prof. Parsons says: "Where the language of a note is capable of two meanings, parol evidence may direct the proper choice to be made between them." 2 Bills and Notes 517.

Third. The evidence shows that when Tyler received the note from the hands of Fowler, the latter intended to invest him with power to negotiate it, and to do whatever was necessary to be done in order to transfer a legal title to the instrument. Tyler, under the circumstances, was empowered, on his own behalf and as agent for Fowler, to invest another with a legal title to the note. One may be orally authorized to indorse for another a promissory note, and where the instrument is in the form of the one under consideration, the indorsement may be made as this note was indorsed, if that was the manner of indorsement contemplated by the makers. 1 Dan. on Neg. Inst., §§ 272-308.

But the defendants in error claim that Tyler diverted the note from the object for which it was executed, and hence Fowler, who executed the note for the accommodation of Tyler, was discharged. The note, as we have seen, is an irregular instrument, and is payable at another bank than the plaintiff in error; but having been indorsed in the manner stated, if there was an understanding between Fowler and Tyler that the latter had general authority to transfer the note, the instrument differs, in no legal sense, from the most formal instrument, although the plaintiff in error knew Fowler was surety. *Stone v. Vance*, 6 Ohio, 246; *Riley v. Johnson*, 8 id. 526; *Williams v. Bosson*, 11 id. 62; *Clinton Bank v. Ayres*, 16 id. 282; *Portage Co. Bank v. Lane*, 8 Ohio St. 405; *Erwin v. Shaffer*, 9 id. 43; *Knox Co. Bank v. Lloyd*, 18 id. 353; *Kingsland v. Pryor*, 33 id. 19. Indeed, according to the syllabus, the transfer of such a note, even in violation of an agreement between the principal and surety, will not discharge the latter, if the indorsee had no knowledge of the agreement.

Finally, it is urged, in support of the instruction to the jury, that Tyler had no power, however fair the transaction may have been on the part of the plaintiff in error, to pledge the note as collateral security for the payment, within ten days, of a protested draft for \$469.55. But the position is untenable, for there was an agreement to delay collection of the draft for the specified time. *Erwin v.*

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Shaffer, supra ; *Razborough v. Messick*, 6 Ohio St. 448 ; 1 Dan. on Neg. Inst., §§ 829-832.

For error in refusing to charge as requested, and for error in the charge as given, in the particulars indicated in this opinion, the judgment will be reversed, and the cause remanded for a new trial.

Judgment reversed.

BOYNTON, J., dissented.

UNION MUTUAL LIFE INSURANCE COMPANY V. REIF.

(35 Ohio St. 506.)

Insurance—life—warranty of temperate habits.

A warranty in an application for life insurance that the applicant has never been intemperate and is of correct and temperate habits, is not broken by occasional excessive indulgences, but a continuous and daily use of intoxicating drinks is not necessary to constitute intemperate habits. (*See note, p. 615.*)

ACTION on a life policy. The defense was breach of warranty set forth in the head-note. The opinion shows other facts. The plaintiff had judgment below.

Saylor & Saylor, for plaintiff in error.

Hoadly, Johnson & Colston and R. W. Nelson, for defendant in error.

JOHNSON, J. The ninth request was that if the jury found that the applicant was, before the date of his application, *addicted to periodical spreeing or getting drunk*, without the knowledge of the company or its agents, the policy would be void, even though there were periods of longer or shorter duration in which he was duly sober.

The eleventh was in substance the same, that if "he was in the habit of *periodically getting drunk*, even though there were times and occasions of longer or shorter duration in which he was duly sober," the policy was void.

Each of these requests were refused, and in lieu thereof the court charged that it was obvious that these questions are not, whether

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the insured was ever drunk, or whether he ever used intoxicating liquors; "but whether he was ever intemperate; that is, whether at any period of his life his usual and *daily habits* were such as to constitute and render him what is known as an intemperate man, — "*a man habitually under the influence of intoxicating liquor.*"

An occasional excess in the use of intoxicating liquor does not, it is true, constitute a *habit*, or make a man intemperate, within the meaning of this policy; but if the habit has been formed and is indulged in, of drinking to excess and becoming intoxicated, whether *daily* and *continuously*, or *periodically*, with sober intervals of greater or less length, the person addicted to such a habit cannot be said to be of temperate habits, within the meaning of this policy.

In view of the fact, that the evidence strongly tended to show that it was the habit of the insured to indulge to excess at frequent times, and did not tend to show a case of daily or continuous state of intoxication, this charge was clearly misleading. From it the jury might well understand, that in view of the whole evidence, we think, may reasonably have understood, that Charles Reif was of correct and temperate habits, although it was his habit to get drunk periodically and frequently, with sober intervals of longer or shorter duration.

The habit of using intoxicating liquors to excess is the result of indulging a natural or acquired appetite, by continued use, until it becomes a customary practice.

This habit may manifest itself in practice by daily or periodical intoxication or drunkenness.

Within the purview of these questions it must have existed at some previous time, or at the date of the application, but it is not essential to its existence that it should be continuously practiced, or that the insured should be daily and habitually under the influence of liquor.

Where the general habits of a man are either abstemious or temperate, an occasional indulgence to excess does not make him a man of intemperate habits. But if the habit is formed of drinking to excess, and the appetite for liquor is indulged to intoxication either constantly or periodically, no one will claim that his habits are temperate, though he may be duly sober for longer or shorter periods in the intervals between the times of his debauches.

In *Miller v. Mutual Benefit Ins. Co.*, 34 Iowa, 222; s. c. 7 Am

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Rep. 122, the insured was shown to be a man who indulged in a periodical habit of drinking to excess, and protracting these debauches until his strength was exhausted. These excesses were not of long duration, and were followed by seasons of sobriety which would last for months. In one of these debauches, he died of *delirium tremens*. It was held that he died from intemperance. Who would say that such a man was of temperate habits? Such a habit of intemperance is quite as material to the risk, and equally as much within the terms of this policy, as the habit of daily intoxication. Indeed, high medical authority is not wanting to show that periodical drunkenness, the result of an uncontrollable appetite, is generally much more excessive, and therefore more dangerous, than daily habitual intoxication.

But it is claimed that the latter part of this charge cures any error that may exist, caused by the use of the word "daily," in the first part. We think not. The concluding sentence: "If you find from the evidence that Charles Reif did *so habitually* use intoxicating drinks to excess, then the plaintiff cannot recover," referred the jury back to the definition, wherein they are told that if his usual *and daily* habits were to be under the influence of liquor he could not recover, and was not a modification, but a reiteration of the error.

Judgment reversed and cause remanded for a new trial.

NOTE BY THE REPORTER.—In *Hutton v. Waterloo Life Insurance Co.*, 1 F. & F. 735, there was a warranty of sober and temperate habits, but it was shown that the insured had had *delirium tremens* the same year the policy was issued, and the year before. Held to justify a finding of breach.

In *Mowry v. Home Life Insurance Co.*, 9 R. I. 346, it was held "that an occasional use was to be deemed intemperance, but that he must indulge in them to such an extent as would be considered an excess."

In *Mutual Benefit Life Insurance Co. v. Holterhoff*, 2 Cin. 379, it was said: "Those who used intoxicating liquors at all within the purview of such insurance policies, may be divided into three classes. The first drink sometimes, and upon occasions as it were more by accident than otherwise, even to intoxication, but in so exceptional a manner that no one can say that they have any habit in regard to such use. They can stop at any time, even take the glass from their lips in the midst of the banquet, and whether such drinking injures the health of those who do it or not, no one can tell with certainty—some think it does, others not. It is obvious that this class would not be embraced in the terms of such a policy as that in this case.

"A second class acquire a constant appetite for the use of intoxicating liquors, and a regular habit of using them, so that the whole system is kept under the immediate influence of alcoholic stimulants. They are known as constant habitual drunkards. This class would be within the prohibition of this policy.

"A third class acquire a constitutionally nervous appetite for alcoholic liquors. It really amounts to a disease. A case is easily recognized by all who are well acquainted with the person. Such persons may remain sober for a month, three or six months, or even

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a year at a time, and refuse to taste any intoxicating drinks (they must refuse if they would not get drunk), and then go upon what is called a 'spree' of great intensity and lasting for a longer or shorter period, usually until prostration and sickness, and often delirium, compel a cessation and terminate the 'spree.' When beginning or in the midst of such periodical debauch, no earthly considerations or persuasions can arrest the course of the subject or induce him to stop drinking. In this he is strikingly different from the first class above named who use intoxicating liquors. And there are two varieties of 'sprees.' The one is boisterous, is seen everywhere, and seeks out and talks to everybody. The other is conscious of his self-degradation and disgrace, and hides himself from observation in his home or room so as not to be seen and not to have his habit and condition known. And few except his family, intimates or neighbors, may know or suspect him. I have not mentioned a class of persons who use intoxicating liquors prescribed as medicines, or who use them at meals as part of their food, without any observable mental or physical effects. They do not come within the purview of legal consideration in connection with life insurance. The classes within such policies are not those whose wills completely regulate and control their use of intoxicating liquors, but those in whom the use and habit daily or periodically control and master the will — where desire and appetite contend with and master the wish and judgment to refrain."

In *Van Valkenburgh v. American Popular Life Insurance Co.*, 70 N. Y. 605, it was held that the question, did the insured "use any intoxicating liquors or substances?" does "not direct the mind to a single or incidental use, but to a customary or habitual use."

In *Rockaway v. Mutual Benefit Life Insurance Co.*, United States Circuit Court, Western District of Pennsylvania, the court thus instructed the jury as to the meaning of "sober and temperate": "The words 'sober and temperate' are to be taken in their ordinary sense. The language does not imply total abstinence from intoxicating liquors. The moderate, temperate use of intoxicating liquors is consistent with sobriety. But if a man use spirituous liquors to such an extent as to produce frequent intoxication, he is not sober and temperate within the meaning of this contract of insurance."

The expression "intemperate habits" has also received construction in criminal cases. Thus in *Tatum v. State*, 63 Ala. 147, under a statute forbidding the sale of ardent spirits to persons of such habits, it is said: "Habit is defined to be 'fixed or established custom, ordinary course of conduct.' Webster Dict. It need not be the uniform or unvarying rule, but to be a habit it must be the ordinary course of conduct — the general rule or custom. It may have exceptions. Exceptions do not destroy a rule. But unless when occasion offers there is a disposition or probable inclination to drink to excess, intemperate habits cannot be predicated. If sobriety is the rule, and occasional intoxication the exception, then the case is not brought within the statute. On the other hand, if the rule is to drink to intoxication when occasion offers, and sobriety or abstinence is the exception, then the charge of intemperate habits is established. Now to make out this charge it is not necessary that this custom shall be an every-day rule." There are persons "whose custom it is to remain sober while at home, and who when in company, or visiting the town or village, generally drink to excess, although occasionally they abstain and remain sober. In such case, drunkenness is shown to be the rule or ordinary course of conduct." The court held that getting drunk two or three times a year was not an "intemperate habit."

Similar terms have been construed in divorce cases. Thus in *Mahone v. Mahone*, 19 Cal 627, the jury were instructed that to constitute a "habitual drunkard," the intoxication must be such as to "completely disqualify the party from attending to his business avocations." This instruction was disapproved on review, and the court said: "If there is a fixed habit of drinking to excess, to such a degree as to disqualify a person from attending to his business during the principal portion of the time usually devoted to business, it is habitual intemperance." This definition was criticised in *Wheeler v. Wheeler*, 53 Iowa, 511, the court observing: "This definition was sufficient for the case in hand, but we do not understand it to have been held that nothing short of the standard fixed in that case would be. It is not regarded as necessary affirmatively to define what constitutes 'habitual drunkenness.' We are not prepared to say however if a person has a fixed habit of drinking intoxicating liquors to excess, is frequently drunk, and that such is his normal condition during the night and in hours not devoted to business, that his wife would not be entitled to a divorce."

Baltimore & Ohio Railroad Company v. Campbell.

The breach of the warranty is fatal without regard to the question whether it tended or aided to produce death. *Conover v. Mass. L. Ins. Co.*, 3 Dill. 217; *Horton v. Eq. L. Ass. Soc. of U. S.*, 2 Big. L. & A. R., 108; *Southcombe v. Merriman*, 1 C. & M. 286.

Habits of intemperance acquired subsequent to the insurance, even though the cause of death, will not avoid the policy unless it is expressly so stipulated. *Odd Fellows' Mut. Life Ins. Co. v. Rohkopp*, Penn. Sup. Ct., March, 1880. *SEARSWOOD, C. J.*, *GORDON* and *TAUSKEY, JJ.*, dissenting.

A mere "declaration" that the applicant does not now nor will practice any pernicious habit that obviously tends to the shortening of life," does not warrant against a subsequent formation of the habit of drinking ardent spirits to excess. *Knecht v. Mut. Life Ins. Co.*, 90 Penn. St. 118; s. c., 35 Am. Rep. 641. But otherwise where the word is "guarantee" instead of "declare." *Knight v. Mut. Life Ins. Co.*, Penn. Supreme Court, January, 1881. And so when "declare" was used with a warranty covering declarations. *Schultz v. Mut. Life Ins. Co. of N. Y.*, 6 Fed. Rep. 672.

In *Kneickerbocker Life Insurance Co. v. Foley*, United States Supreme Court, Oct. 1881, the court said: "His occasional use of intoxicating liquors did not render him a man of intemperate habits, nor would an exceptional case of excess justify the application of this character to him. An attack of *delirium tremens* may sometimes follow a single excessive indulgence. * * * When we speak of the habits of a person, we refer to his customary conduct, to pursue which he has acquired a tendency, from frequent repetition of the same acts. It would be incorrect to say that a man has a habit of anything from a single act. A habit of early rising, for example, could not be affirmed of one because he was once seen on the street in the morning before the sun had risen; nor could intemperate habits be imputed to him, because his appearance and actions on that occasion might indicate a night of excessive indulgence. The court therefore did not err in instructing the jury, that if the habits of the insured, 'in the usual, ordinary and every day routine of his life, were temperate,' the representations made are not untrue within the meaning of the policy, although he may have had an attack of *delirium tremens* from an exceptional over indulgence."

BALTIMORE & OHIO RAILROAD COMPANY V. CAMPBELL.

(36 Ohio St. 647.)

Carrier — of passengers — connecting lines — baggage.

One of several connecting railway companies, accepting fare for passage over the entire line, without agreement as to risks, is liable for the safe transportation and delivery of the passenger's baggage at the end of the route.* A carrier cannot limit his liability by words on a railway ticket or baggage check, even when brought to the passenger's notice, unless the latter agrees to such limitation, and it is for the carrier to show such agreement. The acts and declarations of the baggage agent at the end of the route are competent evidence against the contracting carrier.

ACTION for lost baggage. The facts appear in the head-note and opinion. The plaintiff had judgment below.

*To same effect, *Hawley v. Scriven* (63 Ga. 347), 35 Am. Rep. 126. See *Hadd v. U. S. & Can. Ex. Co.* (52 Vt. 395), 35 Am. Rep. 757, and note, 761. Compare *Nashville and Chattanooga R. Co. v. Spruerry* (8 Baxt. 341), 35 Am. Rep. 706, and note, 708.

H. Skinner, for plaintiff in error.

F. W. Wood and White & Campbell, for defendants in error.

OKEY, J. Several grounds are relied on for the reversal of the judgment rendered in the court below, and the questions presented have been discussed at great length. Those deemed of sufficient importance to call for a report will be briefly considered.

1. Where it is necessary for a traveller, in going from one place to another, to pass over the connecting lines of several railroad companies, it is competent for either company to contract with him for the transportation of himself and his baggage the whole distance, whether such lines are confined to one State or extend through several States. Connecting carriers, in such case, recognizing such contract, become the agents of the contracting carrier, and their negligence is its negligence. And the collection, by such contracting carrier, of fare in advance for the entire journey, without an agreement as to risks, renders it liable, on receipt of the traveller's baggage, to transport it safely to the end of the route, and there deliver it, on demand, to such owner. Schoul. on Bailm. 336; Thomp. on Carr. 431; Lawson on Carr., § 235; Hutch. on Carr., § 145. Of course the carrier selling such ticket may lawfully agree with the passenger that it shall not be liable except for loss or damage occurring on its own road. *Id.*

2. A common carrier cannot restrict his liability for loss of baggage by notice, even when such notice is brought to the knowledge of the passenger. Such restriction can only be made by agreement of the parties, and the burden is on the carrier to show such agreement. *Davidson v. Graham*, 2 Ohio St. 131; *Graham v. Davis*, 4 id. 362; *Wilson v. Hamilton*, id. 722, 740; *Welsh v. Pittsburgh, etc., R. Co.*, 10 id. 65; *Cleveland, etc., R. Co. v. Curran*, 19 id. 1; *Cincinnati, etc., R. Co. v. Pontius*, id. 221; *Union Express Co. v. Graham*, 26 id. 595; *United S. Ex. Co. v. Backman*, 28 id. 144; *Gaines v. Union T. & I. Co.*, id. 418; *Pittsburgh, etc., Ry. Co. v. Barrett*, 36 id. 448. A railroad ticket is not such an agreement. It is simply a voucher that the person in whose possession it is has paid his fare. The same principle applies to baggage checks. *Lawson on Carr.*, §§ 106, 107. An attempt by words on such ticket or check to limit the carrier's liability for loss of baggage will be wholly unavailing, unless the carrier shows that the passenger, with

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knowledge of such limitation, agreed that it might be made. Elsewhere the cases on this subject are not in harmony (*Burke v. South E. Ry. Co.*, 5 C. P. Div. 1; *Lawson on Carr.* 455, 460; *Thomp. on Carr.* 432, 437); but our own cases, to which reference has been made, fully support this view of the law, and such is the clear weight of authority.

3. Application for the baggage was made to the agent in charge of the baggage-room as soon as practicable after Mrs. Campbell and her friends reached Washington. What the agent said and did, with respect to the baggage, was clearly competent evidence for the plaintiffs on trial. *Morse v. Conn. River R. Co.*, 6 Gray, 450; *Laue v. Boston & A. R. Co.*, 112 Mass. 455; *Green v. Boston & L. R. Co.*, 128 Mass. 221; *Dilleber v. Knickerbocker Ins. Co.*, 76 N. Y. 567, 572; *Pierson v. Atlantic Nat. Bank*, 77 id. 304; *Kirkstall Brew. Co. v. Furness R. Co.*, L. R., 9 Q. B. 468.

[A matter of practice omitted.]

There is no error in the record to the prejudice of the plaintiff in error.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
TEXAS.

CARLTON V. CAMERON.

(54 Tex. 72.)

Deed — when operative only as will.

An instrument in the form of a deed, presently granting both real and personal property to the grantor's wife and daughter, in consideration of natural love and affection, and for their better maintenance, support, livelihood and preferment, but containing a reservation of all the property to the grantor for his natural life, is operative only as a will. (*See note, p. 621.*)

ACTION to try title and for partition. The plaintiff claimed under an instrument executed by Abner Lee, in the form of a deed, conveying lands and personal property, and containing this clause: "N. B. The said Abner Lee holding in reserve all the within named estates, both real and personal, during the natural life of the said Abner Lee." The grantees were the grantor's wife and daughter, and the consideration was love and affection and their maintenance and preferment. The defendant claimed under subsequent deeds from the grantor. The defendant had judgment below.

F. W. Chandler and W. M. McGregor, for appellant.

Davis, Beall & Taliaferro, for appellee.

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GOULD, A. J. Although the instrument of July 16, 1836, had the form of a deed, and was placed upon record, it was nevertheless testamentary in its character, and inoperative as a deed, if the intention of the maker appears to have been that it should take effect only on his death. Looking to the terms of the instrument, the nature of the reservation, and of the estate to be created, and bearing in mind that the court below, acting without a jury, passed upon all questions of fact, we are of opinion that the court did not err in its judgment, if it was based on its opinion that the intention of the maker was that the instrument take effect only on his death, and that it was therefore testamentary in its character. There is ample authority supporting such a construction of similar instruments. *Hester v. Young*, 2 Ga. 46; *Turner v. Scott*, 51 Penn. St. 130; *Epperson v. Mills*, 19 Tex. 67; *Ferguson v. Ferguson*, 27 id. 344. As we are of opinion that on this ground the judgment is correct, it is not material to pass on other grounds on which it is also sought to support it.

The judgment is affirmed.

Judgment affirmed.

NOTE BY THE REPORTER. — In *Hester v. Young*, 2 Ga. 31, the gift was "after my death." The court said: "Nor does the fact that this paper contains the formal phraseology of a deed, or that it begins and ends with the technical phraseology of that instrument, make it so. 'If' (in the language of Chancellor HARPER, in *Kinnard v. Kinnard*, 1 Speer, 256), 'the only effect is to dispose of property after the maker's death, it must operate as a will or not at all.' In *Habergham v. Vincent*, 2 Vesey, Jr., 230, BULLER, J., in giving the opinion of the court, holds that an instrument in any form, whether a deed-poll or indenture, if the obvious purpose is not to take place till after the death of the person making it, shall operate as a will. In one of the cases read before this court, and referred to by BULLER, J., in *Habergham v. Vincent*, there were express words of immediate grant, but as upon the whole the intention was to have a future operation after death, it was considered as a will. The intention of the maker as to the character of the estate, and as to the time when it is to take effect, wholly irrespective of the form of the instrument, is to be looked to in determining whether this paper be a deed or will. If the instrument has no effect until death, and that is upon the whole the intention of the maker, it is a will." This case is distinguishable from the principal case, because here there was no gift till "after my death."

In *Turner v. Scott*, 51 Penn. St. 123, the instrument was in form a warranty deed of lands, to the son, in consideration of natural love and affection, and the son's agreement to live with the father, assist him in working the land, and maintain his wife if she survived him, *habendum* after the grantor's death; but reserved the use of the premises to the father and his assigns for his natural life, "and this conveyance in no way to take effect until after the decease of the said John Scott, the grantor." The son recorded it as a deed. This was held a will. As to the warranty, the court said that it protected the consideration if rendered, but was necessarily revocable, as it was limited to take effect only after the death of the grantor. "The doctrine of the cases is, that whatever the form of the instrument, if it vest no present interest but only appoints what is to be done after the death of the maker, it is a testamentary instrument. It signifies nothing that the parties intended to make a deed instead of a will. If they have used language which the law holds to be testamentary, their intention is to be gathered from the legal meaning

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of the words they have employed, for all parties must be judged by the legal meaning of their words." This seems to sustain the principal case, because there was a present gift, not necessarily contravened by the *habendum*, but only by the reservation.

In *Epperson v. Mills*, 19 Tex. 63, the grantor recited his desire to make provision for his children to take effect at his death, and reserved the property to himself for life as trustee for his children. Otherwise the instrument was in form a deed. The court inclined to think it testamentary, but declined to decide the point.

In *Ferguson v. Ferguson*, 27 Tex. 344, the instrument was so ambiguous that its purport was left to the jury!

In *Gage v. Gage*, 12 N. H. 371, the instrument sold personal property which the party "might have at his decease," at which the grantees were to come into possession, and warranted the title and possession. It was delivered to a third party for the grantees. This was held not operative as a will where the parties afterward made a different arrangement intended to supersede and annul it.

In *Shepherd v. Nabors*, 6 Ala. (N. S.) 631, a party gave to the heirs born of his daughter a slave, providing that he should retain possession during his life, and that at his decease the slave should be in full possession of such heirs. Held, a will. *Dunn v. Bank of Mobile*, 2 id. 152, was quite similar, except that the instrument also embraced land.

But in *Ingram v. Porter*, 4 McCord, 198, a deed of a slave, "to have and to hold after my death," etc., was held to vest a present irrevocable interest.

In *Crawford v. McElroy*, 3 Speer, 225, a party agreed in writing that she made over a slave "notwithstanding the slave is still to be under her power, that is to say, during her life-time, but at her decease to be the property of the said T. P." Held, not a deed, because no present interest passed. This is based on *Venron v. Inabnit*, 2 Brev. 411, where the circumstances were precisely similar.

In *Kinard v. Kinard*, 1 Speer Eq. 256, the deed was of gift of slaves, "after my death." Held, only operative as a will.

In *Ragsdale v. Booker*, cited 2 Ball. 590, the deed was of slaves, "at my death," only reserving "my life" in them. Held, testamentary only.

In *Robey v. Hannon*, 6 Gill, 463, a deed conveyed "one-half of all the personal property of which I may die possessed." Held, not a will.

In *Jackson v. Culpepper*, 3 Kelly, 569, a deed conveyed slaves in trust with a warranty and reservation of a life-time and interest. Held, not a will. *Heater v. Tonny*, *supra*, distinguished. The court say: "To constitute this instrument a testamentary paper, its effect must be made to depend upon the event of the death of the donor as necessary to consummate it." Citing *Glynn v. Oylander*, 5 Eng. Ec. 181. To the same effect is *Jagers v. Estes*, 2 Strobb. Eq. 343, where the gift was "to have and to hold from henceforth and forever at my death." This case is a learned discussion of the authorities. The same holding was made in *McGlavin v. McGlavin*, 17 Ga. 234, where a slave was deeded "to be delivered at my death and not before." So in *Williams v. Sullivan*, 10 Rich. Eq. 37, where slaves were deeded as "the following property at my death." So in *Alexander v. Burnett*, 5 id. 189, where slaves were deeded and warranted, with the following provision: "It is clearly and unequivocally understood that the aforesaid deed of gift is to be of no effect whatever, until I depart this life." So in *Mayor v. Williams*, 6 Md. 235, a deed conveying lands in trust for the uses declared in an existing will, and reserving a life interest in the grantor, but containing no power of revocation, was held not testamentary. So in *Executors of Duke v. Dyke*, cited 1 Speer Eq. 259, a deed of slaves, to be and remain her proper right and property after the death of the said "grantor," was held to pass a present interest.

An instrument in the form of a note, but payable "after my decease, on demand," is a note. *Bristol v. Warner*, 19 Conn. 7. To the same effect, *Roffey v. Greenwell*, 10 Ad. & Ell. 223. But where the payee wrote upon the back of a note an order that if he was not alive when it was paid, the contents should be paid to A. H., held, testamentary.

KOCOUREK v. MARAK.

KOCOUREK v. MARAK.

(54 Tex. 201.)

Duress — deed — married woman.

A deed executed by a married woman in consequence of her husband's threats of abandonment unless she complies, may be avoided for duress. (*See note, p. 624.*)

In the absence of fraud, mistake or imposition, the certificate of a wife's separate acknowledgment of a deed is conclusive, and a purchaser is not affected by such fraud, mistake or imposition, unless he had notice.

ACTION by a married woman to avoid her deed of a homestead, for duress. The ground alleged was the threats of the husband to abandon her unless she executed the deed. The defendant had judgment below.

Timmon & Brown, and Phelps & Haiderseck, for appellant.

H. Teichmuller, for appellees, cited as to the effect of the certificate. *Hartley v. Frosh*, 6 Tex. 216; *Shelby v. Burtis*, 18 id. 651; *Williams v. Pouns*, 48 id. 146; *McKellar v. Peck*, 3 Tex. Law Jour. 509, Com. of Ap.; *White v. Graves*, 107 Mass. 325; s. c., 9 Am. Rep. 39; *Kerr v. Russell*, 69 Ill. 666; s. c., 18 Am. Rep. 635; *Heeler v. Glasgow*, 79 Penn. St. 79; s. c., 21 Am. Rep. 46; *Johnston v. Wallace*, 53 Miss. 331; s. c., 24 Am. Rep. 699; *Singer Manufg Co. v. Cook*, 84 Penn. St. 442; s. c., 24 Am. Rep. 204; *Moore v. Fuller*, 6 Or. 272; s. c., 25 Am. Rep. 525.

BONNER, A. J. This case was dismissed on demurrer to the petition, and raises the two questions, whether the allegation presented such legal duress on the part of the husband, as on behalf of the wife should avoid the deed to the homestead; and if so, was the purchaser charged with notice of it.

The general doctrine of this court upon these questions is, that the certificate of the officer to the separate acknowledgment of the wife to a deed of conveyance is conclusive of the facts therein stated, except in cases of fraud, mistake or imposition; and that the rights of a third party will not be affected by such fraud, mistake or imposition, unless they participated therein or had notice thereof. *Wiley v. Prince*, 21 Tex. 640; *Pool v. Chase*, 46 id. 210; *Williams v. Pouns*, 48 id. 146.

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The same strictness, as to what would constitute legal duress on the part of the husband, does not apply against the wife by reason of their peculiar relationship, as in ordinary cases. *Wiley v. Prince*, 21 Tex. 641. In the above case of *Wiley v. Prince* it was decided that threats by the husband to burn down the house and carry away the children were sufficient to avoid the conveyance by the wife.

To the same effect is the case of *Central Bank v. Copeland*, 18 Md. 319.

In *Tapley v. Tapley*, 10 Minn. 458, it was decided that an instruction was properly given, to the effect, that to avoid the deed of the wife, the threats of the husband need not be those of physical injury only, but threats of separation were sufficient, if the wife reasonably apprehended that they would be carried into execution.

It was the evident intention of the legislature, as shown by the express language of the statute, that the conveyance of the wife to be binding must have been willingly executed. R. S., art. 4310.

Tested by the above cases, the allegations in the petition were sufficient, if sustained by competent testimony, to show such moral coercion over the wife and "imprisonment of her mind;" and such notice on the part of the purchaser, Marak, as should avoid her deed. *Louden v. Blythe*, 27 Penn. St. 25.

The demurrer was improperly sustained.

Reversed and remanded.

NOTE BY THE REPORTER.—In *Cent. Bank v. Copeland*, 18 Md. 305, the threats were to destroy the property by fire unless the wife would execute the deed. The court said: "The resort to measures thus violent and harsh leads irresistibly to the conclusion that her consent could not have been obtained otherwise." "The execution and acknowledgment of the mortgage in this case by Mrs. Copeland appears to have been induced by harshness and threats, and the exercise of an unwarrantable authority so excessive, as to subvert and control the freedom of her will."

In *Tapley v. Tapley*, 10 Minn. 448, threats of abandonment by the husband, accompanied by general abusive treatment, constitute duress, because they threaten an "injury to her good name." "Looking at the reason of things, if as is well settled, a threat of injury to goods or other property, a threat of battery or of illegal imprisonment, are held sufficient to constitute duress, and to avoid a contract, on the ground that they take away freedom of action, and are calculated to overcome the mind of a person of ordinary firmness, when believed in, it would seem too clear for argument that equal effect ought to be given to a threat by a husband to abandon his wife and turn her out upon the world, to shift for herself in the anomalous condition of a wife without a husband. If the degree of injury to be apprehended, and its almost remediless nature are to be taken into account (and not to do so would be irrational), then certainly in these respects an abandonment of the wife by the husband is far in excess of a battery to the person, or a trespass upon the goods, and stands upon stronger ground."

Threat of lawful arrest of the husband does not constitute duress of the wife. *Cumpton v. Bunker Hill Bank*, 96 Ill. 301; s. c., 36 Am. Rep. 147. So of threats by the husband to poison himself; *Wright v. Remington*, 12 Vroom, 48; s. c., 32 Am. Rep. 180, and note, 185.

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It seems difficult to reconcile the last case with the principal, or with *Tupley v. Tupley*, *sup.* The threat of the husband to kill himself, and the threat to abandon the wife, seem about equivalent. Perhaps however the former threat is not so grievous, for in case of its execution the wife might get another husband.

The last case was affirmed by the Court of Errors and Appeals, 14 Vroom, 451. The chancellor, giving the opinion said: "By the common law, the defense of duress, indeed, embraces threats of personal injury to husband, wife, parent or child, but its scope does not include a threat of suicide. Obviously in view of the facility of making a defense on that ground, the difficulty of meeting it, and the temptation to fraudulent imposition it would hold out to allow it, it would be against public policy to extend the defense to that kind of pressure." Two of the twelve judges dissented.

MCANEAR v. EPPERSON.

(54 Tex. 230.)

Judgment — jurisdiction — collateral impeachment.

A judgment of a domestic court of general jurisdiction, reciting an appearance by minor defendants, an adjudication that they were minors, the appointment of a guardian *ad litem*, and his appearance and defense for them, but not showing any personal service of citation, cannot be collaterally attacked for want of such service and for fraud.*

TREPASS for title. The defendants claimed under a judgment. The plaintiff replied that they were minors and not personally cited in that suit, and that the judgment was fraudulently obtained. The head-note and opinion show other facts. The defendants had judgment below.

L. E. Dahoney, for appellants.

Hall, Scott & Taylor and *B. H. Epperson*, for appellees.

BONNER, A. J. This case has been held under advisement for several terms of the court.

I. If it be admitted that there was no personal service on the minor defendants in suit No. 2103, in the District Court of Red River county, and who are the plaintiffs in this suit, then the controlling question is this: Was the judgment rendered in that suit void for want of such service on the minor defendants, they

*To same effect, *Taylor v. Snow* (47 Tex. 462), 26 Am. Rep. 811; *Tennell v. Breedlove*, 54 Tex. 540; *Contra, Newcomb's Exrs. v. Newcomb* (18 Bush, 544), 26 Am. Rep. 222; *Ferguson v. Crawford* (70 N. Y. 253), 26 Am. Rep. 539.

having been represented by a guardian *ad litem*, so that it is subject to be collaterally impeached? There is great conflict of authority upon this question.

Much apparent conflict however can be reconciled if the following distinctions be kept in view, between —

1. Those cases in which such judgments have been held irregular and voidable only, and subject to be reversed on direct proceeding, as on appeal or writ of error; and those in which the judgments have been held not absolutely void for want of jurisdiction over the person of the minors so that they could be impeached collaterally.

2. Those cases pertaining to estates, which arose under statutes similar to our probate act of 1848, which made the administrator so far the representative of the heirs, that they were bound by proper proceedings had by or against him, for the sale of real property of the estate, in the due course of administration for the payment of debts, and those under statutes, similar to our subsequent probate act, which required, as a prerequisite to the exercise of such jurisdiction, that special statutory notice should be given.

3. Those cases decided by courts of special limited jurisdiction, where it must be affirmatively shown that the jurisdiction had attached; and those decided by courts of general jurisdiction, in which it will be presumed that the jurisdiction had attached, unless contradicted by the record.

4. Those cases which were considered so far in the nature of proceedings *in rem* that the property gave jurisdiction to the court; and those which were adversary in their nature and required personal service or appearance.

As said by DILLON, C. J., in *Good v. Norley*, 28 Iowa, 207, "the cases on all these subjects are very numerous and do not admit of being reconciled. It would be without profit to burden an opinion with a detailed discussion of them."

After a careful and extended examination of many cases in addition to those cited by counsel, in which the judgments in adversary proceedings, like the one now under consideration, were sought to be set aside, because the minor defendants, although represented by guardians *ad litem*, had not been personally cited, we indorse this remark of Judge HITCHCOCK in *Robb v. Irwin*: "Much is said in the books upon the subject. But I apprehend it will be found upon examination that decrees entered under such circumstances are generally, if not universally, holden to be voidable, not void. Such,

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I have no doubt, is the weight of authority." 15 Ohio, 699; *Preston v. Dunn*, 25 Ala. 507; *Nelson v. Moon*, 3 McLean, 319; *Day v. Kerr*, 7 Mo. 426; *Sheldon v. Newton*, 3 Ohio St. 504.

In *Taylor v. Rowland*, 26 Tex. 293, and *Taylor v. Whitfield*, 33 id. 181, there was neither personal service nor the appointment of a guardian *ad litem*; and besides the judgments in these cases were reversed on direct proceedings for this purpose.

We are of opinion, upon the weight of authority, that a failure to cite the minor defendants personally in suit No. 2103, they having been defended by a guardian *ad litem*, however sufficiently erroneous to have caused a reversal of the judgment against them on direct proceedings, was not such fatal defect as would render the judgment absolutely void, so that it can be successfully impeached on a collateral attack. It may be added that the District Court of Red River county was one of general jurisdiction and entitled to all reasonable presumptions in favor of its judgments; that the judgment recites an appearance by the minors, an adjudication by the court that they were minors, the appointment of a guardian *ad litem*, and his appearance and defense for them. *Horner v. Doe*, 1 Ind. 130; *Day v. Kerr*, 7 Mo. 426.

It does not appear affirmatively by the record that the minors were not personally cited, but only negatively so by failure to show citation and service. Citation was asked, and if served, but judgment was rendered against the minors before the time given them by law to enter an appearance, as seems to have been done against their co-defendant, this would have rendered the judgment voidable only and not void. *McNeill v. Hallmark*, 28 Tex. 157. In *Glenn v. Shelburne*, 29 Tex. 125, such judgment was held erroneous and reversed on writ of error.

[Minor point omitted.]

Affirmed.

 TEXAS COTTON PRESS AND MANUFACTURING COMPANY V.
 MECHANICS' FIRE COMPANY.

(54 Tex. 319.)

Contract — services of fire company.

An incorporated fire company in a city, under the control of the chief engineer of the city at fires, was discharged by him after subduing a fire. The

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owner of the premises employed them to remain longer and extinguish some trifling embers. *Held*, that in the absence of proof of bad faith on the part of the chief engineer, the company could recover of the owner for that service.

ACTION on oral argument. The head-note states the facts. The plaintiff had judgment below.

Davis & Sayles, for appellant.

Scott & Levi, for appellee.

BONNER, A. J. The two cases cited by appellants, the Cotton Press Company, do not sustain the issue in their behalf, as presented by the record. In that of *Davey v. Bark Mary Frost*, 2 Wood, 306, compensation was refused the fire company, on the ground that in suppressing the fire, they were strictly in the discharge of their duty, and that the extra services performed by them were not demanded by the master of the vessel, but were expressly prohibited by him.

The case of *City of Decatur v. Vermillion*, 77 Ill. 315, decided that a person who accepts office for a fixed salary cannot legally charge additional compensation for the performance of his official duties.

Under the agreed facts in this case, it appears that the services for which compensation is sought did not necessarily devolve upon the fire company as a part of their duty, as such, but were extra services, which usually would devolve upon the Cotton Press Company, as bailees, and which reasonably could have been performed by ordinary labor.

Under the rules and regulations governing the fire department of the city, the right to determine when the emergency ceased, which called the company into action, was confided to the chief engineer, and when called off by him the plaintiffs were at liberty to disperse.

His order calling off the company in this case was, so far as shown by the testimony, made properly and in good faith, and plaintiffs would doubtless have dispersed, as did the other companies belonging to the department, had it not been for the express contract for their employment in this extra service, made by the superintendent of the Cotton Press Company.

Had the testimony shown that this order of the chief engineer

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had been made in bad faith, to take advantage of the misfortune of the Cotton Press Company, to improperly coerce them to pay for services which it was the legitimate duty of the fire department to have performed under their general contract with the city, then, on grounds of public policy, the courts should unhesitatingly refuse extra compensation for such services. This however is not the case presented by the record.

It being admitted that the services rendered by the men and engine were reasonably worth the amount recovered, we are of opinion that under the facts and circumstances of this case, the judgment below should be affirmed.

Judgment affirmed.

MILLIKEN V. CITY COUNCIL.

(54 Tex. 388.)

Constitutional law — municipal ordinance — renting houses to prostitutes.

A penal ordinance absolutely forbidding any prostitute or lewd woman to reside in, stay at or in, or inhabit any room, house or place in a city, and forbidding the renting of any such premises to such persons, is void.*

MANDAMUS to recover an office. The plaintiff, mayor of Weatherford, had been removed from office by the common council, for renting a house to a prostitute in violation of an ordinance. The opinion states other facts. The defendant had judgment below.

McCall & McCall and *B. G. Bidwell*, for appellant.

Jasper N. Haney, for appellee.

BONNER, A. J. [Omitting other points.] The ordinance under consideration reads as follows:

“An ordinance to suppress houses and places of prostitution within the city limits, and to punish violations of the same.

“SECTION. I. Be it ordained by the city council of the city of Weatherford, that from and after the publication required by law of

*See note, 85 Am. Rep. 708.

this ordinance, it shall be unlawful for any person or persons to establish, keep or maintain, or be concerned in keeping or maintaining or establishing any house or place of prostitution within the corporate limits of the city of Weatherford.

"SEC. II. Be it further ordained, that any prostitute or lewd woman who shall reside in, stay at or in, or inhabit any room, house or place within the limits of this city, or any person who shall knowingly furnish, rent, let or lease any premises or place within the city limits to any prostitute or lewd woman, or to any person for their use, shall be deemed guilty of an offense.

"SEC. III. That any person violating any of the provisions of this ordinance shall be deemed to have committed a misdemeanor, and on conviction thereof before the mayor's or recorder's court, shall be fined in any sum not less than fifty nor more than two hundred dollars."

The appellant was charged with a violation of section second, by renting certain premises to prostitutes and lewd women.

It will be observed that this section prohibits merely the renting, etc., of any premises or place within the city limits, without reference to the purposes for which the property is to be used.

Although we most heartily approve the desire of the city council that dens and haunts of prostitution, "going down to the chambers of death," shall be prohibited and suppressed; and that their inmates shall not be permitted to ply their nefarious traffic in the property, reputation and souls of fellow-beings, within the limits of the city, yet we are of opinion that the alleged offense in this case did not embrace such act which the council, under our Constitution and laws, had the power to make penal.

That unfortunate and degraded class against whom the ordinance was mainly intended, however far they may have fallen beneath the true mission of women, which it is one of our highest duties to foster and protect in social and domestic life, are still human beings, entitled to shelter and the protection of the law; and the council did not have the power to so far proscribe them as a class, as to make it a penal offense in any one to rent them a habitation without regard to its use.

Such an ordinance is null and void, because unreasonable and in contravention of common right. Const. 1876, Bill of Rights, §§ 19, 20; *Chy Lung v. Freeman*, 2 Otto, 275; *Hayden v. Noyes*, 5 Conn. 391; *Hayes v. City of Appleton*, 24 Wis. 542; *Barling v. West*,

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29 id. 315 ; s. c., 9 Am. Rep. 576 ; *Austin v. Murray*, 16 Pick. 121 ; *Dunham v. Trustees, etc.*, 5 Cow. 462 ; 1 Dill. Mun. Corp., § 259 ; Cooley Const. Lim. (4th ed.) 246.

Under proper rules of construction, the ordinance, being penal in its character and working a forfeiture of office, should not be held to embrace by intendment what is clearly not within its language.

[Omitting other matters.]

Reversed and remanded.

PFEUFFER V. MALTBY.

(54 Tex. 454.)

Contract — public policy — accounting.

When an illegal partnership enterprise has been completed, one partner cannot refuse to account to the other for the profits on the ground of the illegality of the partnership objects.

SUIT for partnership accounting. The purpose of the partnership was to carry on an illegal trade in cotton with Mexico during the late civil war. The defendant had judgment below.

Lackey & Stayton, for plaintiff in error.

F. E. Macmanus, for defendant in error.

WALKER, Comr. [Omitting points of practice.] Whether the contract of partnership, at the time it was formed and entered upon by the parties, was illegal and void as against public policy, is not necessarily the controlling question; but the true inquiry is, whether a party to that contract is liable or not, in action against him, brought by his former partner, to recover from him his share of the proceeds of the partnership. In the case of *De Leon v. Trevino*, 49 Tex. 89; s. c., 30 Am. Rep. 101, it was held, that although a contract may be illegal, it does not follow that it is illegal or immoral for the parties to it, after its completion, to fairly settle and adjust the profits and losses which have resulted from it. That the vice of the contract does not enter into such settlement. The

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discrimination made by Chief Justice MOORE, in the opinion which he rendered in that case, between refusing relief to maintain and give effect to the original obnoxious contract, and of granting relief to sustain a subsequent contract, though collateral to it, after the complete consummation of that which was illegal, seems on principle and authority to be applicable to cases of a like character, where the plaintiff seeks to enforce his remedy at law, and the defendant refuses to make such voluntary settlement. Quoting further from the opinion of the chief justice, in the case of *Brooks v. Martin*, on a bill of equity by one partner against the other, to set aside a contract of sale of his interest in the partnership venture, the Supreme Court of the United States held, that "after a partnership contract confessedly against public policy has been carried out, and money contributed by one of the parties has passed into other forms, the results of the contemplated operation completed, a partner in whose hands the profits are, cannot refuse to account for and divide them on the ground of the illegal character of the original contract." 2 Wall. 70. Other cases equally pertinent to the question are cited in that opinion, to which I will now refer without further quotation, viz.: *Planters' Bank v. Union Bank*, 16 Wall. 483; *Sharp v. Taylor*, 2 Phillips Ch. 801; *Faikney v. Reynolds*, 4 Burr. 2070; *Petrie v. Hannay*, 3 T. R. 418. See also *Lewis v. Alexander*, 51 Tex. 590, and the authorities there cited, for the proposition stated in the opinion, that "the courts are not inclined to extend the rule of law which refuses to lend its aid to either of the parties to an illegal contract, beyond the immediate parties, or subject matter of the contract itself."

[Omitting an *obiter* consideration.]

Reversed and remanded.

HOUSTON & TEXAS CENTRAL RAILWAY COMPANY V. SYMPKINS.

(54 Tex. 615.)

Negligence — railroad company's duty toward trespasser.

One who without authority enters upon a railway track, and while there becomes insensible from providential causes, and while in this state, and in plain view, is injured by a train, may recover damages of the company, although the injuries were not wanton or willful; but otherwise if his insensibility was by reason of his voluntary intoxication. (*See note, p. 637.*)

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ACTION for personal injuries by negligence. The opinion states the facts. The plaintiff had judgment below.

Geo. Goldthwaite, Turner and Baker & Botts, for appellant.

F. W. Henderson & Gustave Cook, for appellee.

GOULD, A. J. On the 10th of April, 1873, at noon, W. J. Sympkins, lying in a state of insensibility on the road-bed of the Central Railway, at a point where there was a long curve, and about 190 steps from a public crossing, was run over by the cars, whereby he lost his right arm, and was otherwise bruised. On his behalf, it is claimed that whilst walking on the railroad track he was providentially stricken down by a fit; that at the point on the curve where he fell, the engineer, by keeping a proper look-out, could have discovered him at about 300 steps distance, in ample time to have stopped the train and avoided the accident. On the part of the railway company, it is asserted that Sympkins' fit was nothing more than one of intoxication; that at all events he was negligent originally in walking on the track, and was wrongfully there; that he was lying outside of the rails in such a way that the engineer neither could nor did discover him in time to avoid running over him, he having immediately used every means to stop the train.

In its charge the court told the jury: "If the evidence satisfy you that the engineer could, by the use of due and proper care and attention, have discovered the plaintiff on the track in time to have stopped without running over him, then his not doing so is such negligence as will render defendant company liable to plaintiff."

The defendant asked sundry charges, embodying the proposition, that unless the engineer actually saw Sympkins a sufficient length of time and distance to stop the train and prevent the injury, the company was not liable; and denying that as to persons wrongfully on the track, the law imposed on the railroad any duty to keep a look-out, or any liability except for "willful or wanton negligence on the part of its agents." The following charge was also amongst those asked and refused:

"It is in evidence before you that the plaintiff had on the same day taken one or more drinks of liquor, and that he never before that day, nor since, has had a fit. It is your peculiar province to determine whether or not that fit was a fit of intoxication. If he

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was in a fit of intoxication or drunk, at the time of the accident, and the accident was occasioned in any degree by that fit of intoxication or drunkenness, then and in that case the defendant is not liable, and the plaintiff is not entitled to recover, unless the accident happened and was occasioned by the wanton or willful negligence of the engineer, or those in charge of the train."

The plaintiff recovered a judgment, and the questions here presented arise mainly on the charge. We do not assent to the proposition that a railroad company may not become liable to one who is run over and injured by reason of the want of watchfulness of its servants, although such person may have been originally a trespasser on the track. If a party be wrongfully on the track under such circumstances, or being there, acts in such a way as to be himself a proximate cause of his own injury, he will be precluded from recovery on grounds of public policy, as being himself guilty of contributory negligence. Although the company's agents may have failed in proper watchfulness, the injured person is regarded as being himself too directly a cause of the injury to be allowed to complain. It is not that no wrong has been done by the company in the negligence of its agents, but that the injured party is precluded from complaining of that wrong.

A man goes upon the railroad track at a time and place when no danger is nigh, and whilst there by some accident or providential cause becomes insensible, and so remains perhaps for hours, until the time for a train comes round. Although he originally goes on the track wrongfully, it is under circumstances threatening no direct injury nor being on the track, does he do any thing "positive or negative to contribute to the immediate injury." *Baltimore & O. R. R. Co. v. Stute*, 33 Md. 554. If the engineer on the approaching train keep that look-out which is required of him at all times, not only to secure the safety of the train, but to avoid injury to any animal or person on the track, this person lying there in open view must be discovered. Not to discover him is under the circumstances, negligence, and that negligence is the proximate cause of the injury; whilst the negligence of the party in going on the track is only a remote cause. Between that original act of negligence and the injury has intervened a new agency, a providential dispensation, breaking the causal connection. *Brandon v. Gulf City Cotton Press*, 51 Tex. 121. Here there is not such contributory negligence as prevents the party from recovering for an injury caused by

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the negligence of the company's agent, and if a recovery be denied, it must be placed on some other principle.

Counsel for appellant cite a number of cases which deny any duty on the part of a railroad company to one wrongfully on the track, and deny any liability for injury to such person caused by any thing short of wantonness. On examination it will be found that in most of these cases the plaintiff either directly contributed to the injury, or the negligence established in the defendant's servants was not the cause of the injury. Take for example two leading cases in Pennsylvania, where this doctrine has been most forcibly asserted. *Railroad v. Norton*, 24 Penn. St. 469, was a case where the plaintiff had fastened his machinery for sawing wood to the rail of the company's road, and the court holds "it evident that the imprudence of the plaintiff was the immediate cause of the injury." *R. R. Co. v. Hummell*, 44 Penn. St. 378, was a case of injury to a child, in which the only negligence charged was a failure to blow the whistle or give signals on starting. It does not appear from the evidence that this failure was the cause of the injury.

It may safely be asserted that but few cases can be found where a party, not guilty of contributory negligence, and establishing an injury which would have been prevented but for the carelessness of the company's agents, has been denied a recovery on the ground that the company owe no duty of carefulness to one wrongfully on their track.

In our opinion, there is a distinction between the duty devolving on the owners of land on which there is a dangerous excavation, and that devolving on a corporation invested by law with the extraordinary power of traversing the country with huge cars, whose progress everywhere is necessarily attended with danger. They who place such dangerous machines in motion should, we think, be required to take precautions against their injuring any one who may happen to be in their pathway. "The care in conducting any business should be proportionate to its dangerous motion." *Gorman v. Pac. R. R. Co.*, 26 Mo. 448. The extent of the precautions required of a railroad company depends on all the circumstances. The regulations of railroads exact watchfulness of the engineers, and this rule should operate for the benefit of the public as well as the company.

Authorities are not lacking in support of the position that a "reasonable look-out," varying according to the danger, and all the

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surrounding circumstances, is a duty always devolving on those in charge of a railroad train in motion. *Baltimore & Ohio R'y Co. v. State*, 36 Md. 366; *Baltimore & Ohio R'y Co. v. State*, 33 id. 554; *Harlan v. St. Louis, Kansas City & N. R'y Co.*, 65 Mo. 23; *Hicks v. Pacific R. R. Co.*, 64 Mo. 430. The duty of watchfulness has often been enforced against railroads in cases of injuries to cattle trespassing on their track, and that, too, in the absence of any statutory provision or in cases outside of the statute. *Isbell v. N. Y. & N. H. R. R. Co.*, 27 Conn. 393; *Gorman v. Pac. R. R. Co.*, 26 Mo. 442; *Chicago & Ill., R. R. v. Barrie*, 55 Ill. 226; *Kerwhacker v. C. C. & C. R. R. Co.*, 3 Ohio St. 172. We prefer that line of decisions holding railroads bound to exercise their dangerous business with due care to avoid injury to others, as correct in principle and sound in policy, and as protecting even a trespasser who is not guilty of contributory negligence. We are inclined however to the opinion that the charge given by the court in this case may have led the jury to believe, that they could only find for defendants should they think that the engineer "could not and did not discover plaintiff on the track in time to stop, without running over him." Read as a whole, especially in connection with its final clause, the charge is not erroneous, and may not perhaps have been misunderstood. We call attention to it, because of our opinion that the watchfulness required depends on all the circumstances, having reference to all the duties of the engineer, and that it is for the jury to say whether, under the circumstances, he not only could, but should have discovered the plaintiff in time to have stopped the train. In other words, that the engineer, had he been exercising that ordinary and proper care which under the circumstances was his duty, would have discovered the plaintiff in time.

But we are of opinion that the court, its attention being called to the subject by a charge asked by defendant, should have given the jury an instruction as to their duty in the event they found that the plaintiff was intoxicated when the accident occurred. Whether he was so intoxicated or not, was under all the evidence an issue of fact for the jury. If they found, as claimed by defendant, that his fit was one of intoxication, the authorities seem to be that "such conduct is contributory negligence which constitutes a bar to his action for damages." 1 Thomp. on Neg. 450, citing *Ill. Cent. R. R. Co. v. Hutchinson*, 47 Ill. 408; *Herring v. Wilmington & Raleigh R. R. Co.*, 10 Ired. 402; *H. & T. C. R. R. Co. v. Smith*, 52 Tex. 178. In

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such case the injured party would be precluded from recovering for any thing short of wanton or willful neglect.

Because of this error the judgment is reversed and the cause remanded.

Reversed and remanded.

NOTE BY THE REPORTER.—See *Chic. and Alton R. Co. v. Kellam* (93 Ill. 945), 34 Am. Rep. 128; *Richmond and Danville R. Co. v. Anderson's Adm'n.* (81 Gratt. 812), 31 Am. Rep. 740; *Kans. Cent. Ry. Co. v. Missimans* (38 Kans. 686), 31 Am. Rep. 203, and note 298; *Meeks v. South. Pac. R. Co.*, ante, p. 67.

In *Little Rock, etc., Ry. Co. v. Pankhurst*, 36 Ark. 371, the decedent was walking on the defendant's track, in a well worn path, drunk and staggering, and about dark lay down on the track and was run over by a train. The plaintiff's counsel obtained the following instructions: "If you believe from the evidence that the deceased was in fault in walking on defendant's track, and while walking on it was killed by the defendant's engine or cars, but the defendant's agents were aware, or ought, by the use of ordinary diligence, to have been aware of the fact that he was on the track, in time to avoid killing him, by the use of reasonable diligence, the failure to use such diligence alone must be considered the proximate cause of the injury; and in that event you should find for the plaintiff." On review the court said that although the defendant was negligent in not having a light and lookout, "yet the deceased's own negligence in being voluntarily on the track, and from intoxication unable to get out of the way of the train, was the proximate cause of his death. The second and third instructions therefore did not state the law correctly." But here there was no proof of ability to discover the decedent.

In *Lavrenz v. Chicago, etc., R. Co.*, Iowa Supreme Court, October, 1881, it was said: "It is true that where a person voluntarily goes upon a railroad track where there is an unobstructed view of the track, and falls, without excuse, to look or listen for danger, as matter of law he is not entitled to recover. He must take the chances of injury from an approaching train upon himself unless the persons in charge of the train see his danger in time to avert it. *Carlin v. R. R. Co.*, 37 Iowa, 310; *Benton v. R. R. Co.*, 42 Id. 192; *Lang v. R. R. Co.*, 49 Id. 469; *Arts v. R. R. Co.*, 34 Id. 153."

In *Moore v. Pennsylvania R. R. Co.*, Pennsylvania Supreme Court, January, 1882, a bright, intelligent boy, ten years old, was walking on the ends of the sleepers of defendant's track, laid in a public street, in a populous neighborhood; there was an ample sidewalk on each side of the track; he was struck and killed by a rapidly passing train. A nonsuit was sustained, two judges dissenting. The court said: "Of course, in such circumstances, he was a trespasser, and not only put himself in peril by his rashness, but also endangered the safety of any passing trains, and the lives of passengers. We have so frequently held that in such circumstances there can be no recovery, that it is unnecessary to quote the authorities. As the testimony was entirely undisputed, it was the duty of the court to pass upon it, which they did by directing a nonsuit. In this there was no error. The circumstance that the trespasser in this instance was a boy ten years of age cannot affect the application of the rule. The defendant owed him no greater duty than if he had been an adult. They are not subject to an obligation to take precautions against any class of persons who may walk on and along their tracks. In *Railroad v. Hummell*, 8 Wr. 375, the rule was applied to the case of a child seven years old. And so also in the latest case of the kind that has been before us, *Cauley v. Railroad*, Dec. 31, 1880, the rule was in no wise relaxed, although the person injured was a boy of tender years. In the first of these cases, we used the following language, having reference to the facts in evidence: 'But if the use of a railroad is exclusively for its owners, or those acting under them; if others have no right to be upon it; if they are wrong-doers whenever they intrude, the parties lawfully using it are under no obligations to take precautions against possible injuries to intruders upon it. Ordinary care they must be held to, but they have a right to presume and act on the presumption that those in the vicinity will not violate the laws; will not trespass upon the right of a clear track; that even children of a tender age will not be there; for though they are personally irresponsible, they cannot be upon the railroad

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without a culpable violation of duty by their parents or guardians. Precaution is a duty only so far as there is a reason for apprehension. No one can complain of want of care in another where care is only rendered necessary by his own wrongful act."

In *Mulherrin v. Del., L. & W. R. Co.*, 81 Penn. St. 366, the court observed: "It was held in *Railroad v. Norton*, 12 Harris, 465, that where a person places himself on the track of a railroad, he can claim no damages except for wanton injury, and not for injury sustained in the pursuit of the company's lawful business in the ordinary manner, even though the negligence of the company's agent contributed to the result. It is said by Mr. Justice Woodward, in delivering the opinion of the court, that in order to make railroad companies to carry safely, 'the law insists upon a clear track.' This doctrine cannot be too emphatically asserted or rigidly enforced. We hold these corporations to a strict line of responsibility whenever passengers are injured by accident to their trains. It follows that we should be equally emphatic as to the control of their tracks. Except at crossings, where the public have a right of way, a man who steps his foot upon a railroad track does so at his peril. The company have not only a right of way, but such a right is exclusive at all times and for all purposes. This is necessary, not only for the proper protection of the company's rights but also for the safety of the travelling public. It is not right that the lives of hundreds of persons should be placed in peril for the convenience of a single foolhardy man, who desires to walk upon the track. In England it is a penal offence for a man to be found unlawfully upon the track of a railroad. It would add immensely to the public safety were there a similar law here."

In *Philadelphia, etc., R. Co. v. Speare*, 47 Penn. St. 304, the court observed: "If the engineer saw the adult in time to stop his train, but the train being in full view, and nothing to indicate to him a want of consciousness of its approach, he would not be bound to stop his train. Having the right to a clear track, he would be entitled to the presumption that the trespasser would remove from it in time to avoid the danger; or if he thought the person did not notice the approaching train, it would be sufficient to whistle to attract his attention without stopping. But if instead of the adult it were a little child upon the track it would be the duty of the engineer to stop his train upon seeing it. The change of circumstances from the possession of the capacity in the trespasser to avoid the danger to a want of it would create a corresponding change of duty in the engineer. In the former case, the adult concurring in the negligence causing the disaster, is without remedy; in the latter, the child not concurring, from want of capacity, the want of ordinary care in the engineer would create liability. But if the train were upon the child before it could be seen, or if it suddenly and unexpectedly threw itself in the way of the engine, the engineer being incapable of exercising the measure of ordinary care to save it, the child would be without remedy, for the company's use of its track is lawful, and the presence of the child is unlawful."

In *Indianapolis, etc., R. Co. v. McClaren*, 62 Ind. 563, the court said: "The only fact from which an inference that the injury in this case was so" (i. e., willfully and purposely) "inflicted could have been drawn was, that the managers of the train did not stop it some little time before overtaking the deceased, and send hands enough to take him off the track, and hold him till the train passed. The question of law is, was such the duty of the railroad company? If it was, it was so because the presumption is that a person on a railroad track in front of an approaching train will not leave the track, but remain upon it and be killed, if such person is not forcibly removed from it. If such is the general presumption, then it may be the duty of a railroad train to come to a dead stop at a distance far enough from a person observed upon the track to enable it to send a force and remove him from the track before the train passes. This practice would necessarily render railroad transportation so slow as to lead to its abandonment and a return to the old methods of transportation by muscular power, with the aid of wagons, etc., which vehicles may pass around and avoid obstacles in their path. We do not believe the general presumption is as above stated. We believe the presumption to be that a trespasser upon a railroad track, when he discovers a train approaching, will, from a care of his personal safety, if not from a sense of duty, leave the track before the train reaches him, and that the managers of trains may act upon that presumption."

In *Houston, etc., R. Co. v. Smith*, 52 Tex. 173, stress was laid on the fact that the plaintiff was intoxicated, but the court also observed: "The law presumes that a person walk-

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ing upon a railroad track will leave the same in time to prevent injury from an approaching train of which he has knowledge, or should have, by the ordinary use of the senses of hearing and seeing and the managers of the train may act upon this presumption. *Railroad Co. v. Müller*, 25 Mich. 379; *Indianapolis and Vincennes Railroad Co. v. McClaren*, 62 Ind. 566."

In *Leabell v. Hannibal & St. Joseph R. R. Co.*, 60 Mo. 475, the doctrine of the principal case was held where an infant lying on the track was mistaken for a hog or dog, and no effort was made to stop the train; and so in *East Tennessee, etc., R. Co. v. St. John*, 5 Sneed, 524, where the train ran over a slave eight years old, asleep on the track, and visible a quarter of a mile distant, but mistaken for a coat of one of defendant's laborers.

In *Baltimore, etc., R. Co. v. State*, 33 Md. 542, the court said: "If a man does imprudently and incautiously go on a railroad track, and is killed or injured by a train of cars, the company is responsible unless it has used reasonable care and caution to avert it, provided the circumstances were not such when the party went on the track as to threaten direct injury, and provided that being on the track he did nothing, positive or negative, to contribute to the immediate injury."

In *Weymire v. Wolfe*, 52 Iowa, 533, the court said: "If a person lies down upon a railroad track in a state of helpless intoxication, the company will not be justified in running a train over him, if it can be avoided in the exercise of reasonable care, after the person is discovered in his exposed condition."

The distinction in question is admirably defined in *Lake Shore and Michigan Southern R. R. Co. v. Müller*, 25 Mich. 379. The court said: "But if an engineer see a team and carriage, or a man in the act of crossing the track, far enough ahead of him to have ample time, in the ordinary course of such movements, to get entirely out of the way before the approach of the engine; or if he sees a man walking along upon the track at a considerable distance ahead, and is not aware that he is deaf or insane, or from some other cause insensible of the danger; or if he sees a team or man approaching a crossing too near the train to get over in time, he has a right to rely upon the laws of nature and the ordinary course of things, and to presume that the man driving the team or walking upon the track has the use of his senses, and will act upon the principles of common sense and the motive of self-preservation common to mankind in general; and they will therefore get out of the way, that those on the track will get off, and those approaching it will stop in time to avoid the danger; and he therefore has the right to go on without checking his speed until he sees that the team or man is not likely to get out of the way, when it would become his duty to give extra alarm by bell or whistle, and if that is not heeded, then, as a last resort to check his speed or stop his train, if possible in time to avoid disaster. If however he sees a child of tender years upon the track, or any person known to him to be, or from his appearance giving him good reason to believe that he is insane or badly intoxicated, or otherwise insensible of danger, or unable to avoid it, he has no right to presume that he will get out of the way, but should act upon the belief that he might not, or would not, and he should therefore take means to stop his train in time. A more stringent rule than this—a rule that would require the engineer to check his speed or stop his train whenever he sees a team crossing the track or a man walking on it, far enough ahead to get out of the way in time, until he can send ahead to inquire why they do not; or which would require the engineer to know the deafness or blindness, or acuteness of hearing or sight, or habits of prudence or recklessness, or other personal peculiarities, of all those persons he may see approaching, or upon the track, and more especially of all those who may be approaching a crossing upon the highway, though not seen—any such rule, if enforced, must effectually put an end to all railroads, as a means of speedy travel or transportation, and reduce the speed of trains below that of canal boats forty years ago; and would effectually defeat the object of the legislature in authorizing this mode of conveyance. But how are railroad companies, or their engineers or employees, to know the personal peculiarities, the infirmities, personal character or station in life, of the hundreds of persons crossing or approaching their track? By inspiration or intuition? And if they do not know, then how and why shall the company be required to run their road or regulate their own conduct, or that of their servants, by such personal peculiarities of strangers, of which they know nothing? These questions suggest their own answers."

CASES
IN THE
COURT OF APPEALS
OF
TEXAS.

MEANS V. STATE.

(10 Tex. Ct. App. 16.)

Criminal law — evidence — res gesta — declarations of victim of homicide.

On a trial for murder, a witness testified that on the occasion in question the deceased, sitting in church and looking out of a window, said to witness that the defendant was outside fixing to shoot him, and deceased immediately rose and went to the door, where some one fired on and killed him. Held that the declaration was admissible, as part of the *res gesta*. (See note, p. 641.)

CONVICTION of murder. The opinion and head-note state the facts.

Stayton, Lackey & Kleburg, for appellant.

Thomas Ball, assistant attorney-general for State.

WHITE, P. J. [Omitting other matters.] More than that, we have the declaration of deceased to his brother just before the killing: "Alley Means is outside there, fixing to shoot me; I am afraid he is going to shoot me right here in the church." Imme-

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diately the deceased goes to the door, where the fatal shots are fired. No one sees the party who does the shooting, it is true, but defendant and his horse, which had been tied or was standing a few feet off, both disappear and are seen no more about the premises after the shooting. Under such circumstances, would not the mind of any sensible, rational being naturally conclude that defendant, and he alone of all the enemies of the deceased, was the party who did commit the deed, if from no other reason from the sole one that he was the only enemy who had the then present opportunity to commit, and was the only one in immediate juxtaposition to, the crime? We think so. The case is not one purely of circumstantial evidence, and the court did not err in refusing to permit the testimony offered of the hostility of other parties.

So far as the declarations of the deceased to his brother, to the effect that "Alley Means is outside there, fixing to shoot me; I am afraid he is going to shoot me right here in the church," are concerned, and which were objected to by defendant at the time, they were clearly *res gestæ*, and admissible as original evidence. *Cox v. State*, 8 Tex. Ct. App. 256.

Affirmed.

NOTE BY THE REPORTER.—See *Cox v. State*, 64 Ga. 374; s. c., 37 Am. Rep. 76.

In *Williams v. State*, 10 Tex. Ct. App. 538, a case of murder by shooting, the victim, who survived but a few minutes, in answer to a question, gave the name of the defendant as the person who shot him. Held, competent as part of the *res gestæ*.

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(10 Tex. Ct. App. 418.)

Criminal law — statutory construction — excise law.

A statute allowed the sale of ardent spirits by druggists only upon the prescription of physicians in sickness. The defendant was a druggist and also a physician and attending physician of a certain sick person, and sold such person some whisky, to be used as medicine in such sickness. Held, that he was not bound to obtain the prescription of another physician therefor.

CONVICTION of illegally selling intoxicating liquors. The opinion states the facts.

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A. J. Williams, for appellant.

H. Chilton, assistant attorney-general, for State.

HURT, J. The appellant was a druggist and the family physician of James Adams. Mrs. Adams being very sick, the defendant was applied to by her husband for medicine. He (defendant) prescribed camphor gum and chloroform, and when the husband inquired how the medicine should be given, defendant told him that it should be given in whisky; whereupon Mr. Adams requested of defendant a prescription to one Dr. Brown for the whisky. Defendant remarked that he could give the prescription, or could furnish the whisky, as he kept it in his office for medical purposes, to administer to his patients. Thereupon Adams got the whisky, receiving at the same time (from defendant) instructions how to mix it and the medicine, and how to administer the same to his wife.

It is shown by the evidence that Mrs. Adams was not only actually sick, but very sick; also that the whisky was a stimulant absolutely required to be given with the other medicine. These being the facts, had the defendant the right to sell the whisky, or was he required (under these circumstances) to send her husband to some other person with a written prescription for the whisky, as is provided by art. 379 of the Penal Code? We think not; for if there was a case of actual sickness which required the whisky as a medicine, the defendant, being a regular practicing physician, had the right to sell it without having the prescription of another physician. Art. 379 does not apply to regular practicing physicians, when the whisky is sold as a medicine in case of actual sickness; but to persons who are not physicians, and therefore are not supposed to be proper judges of the necessity of giving this stimulant as such, or as a solvent of other medicines.

[Omitting another point.]

Reversed and dismissed.

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ROSS v. STATE.

(10 Tex. Ct. App. 455.)

Criminal law — homicide in resisting unlawful arrest.

A marshal undertook without warrant or legal authority to arrest one of the defendants and take away his gun; he being advised by his brother, the other defendant, to resist, offered resistance; whereupon the marshal drew and fired a pistol at the first defendant; and the other defendant then shot and killed the marshal. Held justifiable.

CONVICTION of murder. The head-note states the facts.

Makemson, Fisher & Price, for appellants.

H. Chilton, assistant attorney-general, for State.

HURT, J. [Omitting preliminary and statutory considerations.] Hall, the deceased, having no right to arrest the defendants or either of them, what were the legal rights of the defendants, if in preventing this illegal arrest, they or either of them slew him? We think these are the correct rules:

1. The law of self-defense justifies the repelling of force by force in such cases, even unto death, but does not justify wanton or unnecessary aggression. If a person, in resisting an illegal arrest, makes use of a deadly and unnecessarily dangerous weapon, and with it slays his adversary, the crime is not, because of the use of a deadly weapon, or because the force used is greater or more violent than was required, raised above the grade of manslaughter. For the value the law sets upon the liberty of the citizen is so high that an attempt to arrest him unlawfully is regarded a great provocation, such as will reduce the killing to manslaughter. This principle is now well established. See the following cases: *Rex v. Curvan*, 1 Moody C. C. 132; *Roberts v. State*, 14 Mo. 146; *Com. v. Cary*, 12 Cush. 246; *Tackett v. State*, 3 Yerg. 392; *Galvin v. State*, 6 Cold. 291; *Alford v. State*, 8 Tex. Ct. App. 545.

2. As the law, divine and human, gives the citizen the right to stand upon his individual rights, and use force against force to

successfully prevent the attempted wrong, the citizen whose liberty is thus unlawfully assailed cannot only use force, but can increase that force and continue to increase it even to the death if necessary to prevent the attempted wrong, and if he slay his adversary he will be held excused. Otherwise, the lawless aggressor, the vindictive oppressor will be permitted to triumph over the rights and liberties of the citizen. Right will be made to do homage to wrong, and look to future redress in the courts of the country. This is not American law. The citizen has the right to maintain his liberty at all hazards, against any and all persons who attempt to invade it unlawfully, taking care not rashly to use or resort to greater violence than is necessary to its protection. Again, being in the right, he is permitted to anticipate the aggressor and prepare himself by drawing a weapon, or making any other preparations, and if his life is imperiled or he is in danger of serious bodily harm, to use every means in the defense of his person or liberty. He is not required to permit his assailant to take the lead, and thereby give him the advantage, but if the surroundings indicate a resort to a serious or deadly conflict on the part of the adversary, he can prepare to meet it, and if the adversary makes demonstration upon his life or liberty, or shows an intent to inflict serious bodily harm upon him, he can kill him and be held blameless by the law of the land.

The evidence in this case, we think, requires of us a statement of the law applicable to a defense against trespasses upon property; for if the defendants or either of them had committed no offense and were not subject to an arrest, the deceased had no right to take the gun of William Ross from him, and when he attempted to do so, he became and was trespasser upon his property. This being the case, what were the rights of the defendant?

It is stated in the books that there is a difference in the law applicable to a defense against an unlawful arrest, and that applicable to a defense against trespasses against property; and that the difference consists in this:

“If a person resisting a trespass upon his property makes use of a deadly weapon, and with it kills the trespasser, it is murder, while in the other case it is ordinarily but manslaughter; but although a person resisting an illegal arrest makes use of a deadly weapon, and with it slays his adversary, the crime is not, because of the use of such deadly weapon, raised above the degree of manslaughter.” The principle above enunciated, we without hesitation approve,

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with the proper explanation and modification. If the trespasser were unarmed, and simply attempts the trespass without force of arms, and neither intends nor endeavors to commit a felony nor to inflict serious bodily harm upon the owner in case he resisted, to kill with a deadly weapon is, and in justice should be deemed murder.

But suppose he is armed and attempts to take the property by force, and in order to be successful intends manifestly to kill the owner of the property, if necessary to accomplish his purpose, and is killed by the owner or any other person, this would be excusable self-defense. And although there was no intention to steal or rob, and therefore no felony in respect of the property, yet as the intent was to kill the owner if necessary to accomplish the purpose, the felony would consist in the intention and attempt to kill the owner. Then again, we find that in the protection of his property the citizen has the right to oppose force to force, and if necessary to prevent the trespass, to take the life of the aggressor. The principle is this: When his person or property is assailed, he is not required to yield in the least, but in all cases may stand upon his rights, taking care not to resort to a greater degree of violence than is necessary to their protection. For if the law will permit him to oppose slight force to slight force, why not the greatest violence if necessary to the protection of those rights? A contrary rule leads to a denial of the right in any case; for if he can only go so far, and then yield to the aggressor, logic and common sense require that he should have yielded at the first. *Payne's case*, Horr. & Thomp. Self Def. 863 and 900, note 1; *People v. Hubbard*, 24 Wend. 369; *Curtis v. Hubbard*, 1 Hill (N. Y.), 336; 4 Hill, 437.

We do not think that these principles were applied to the case by the court below in its charge to the jury. As to the right of Alonzo Ross to act in the protection of the life, liberty and property of his brother William, there can be no question. He, to the same extent that William, could oppose force to force, and if required to prevent the accomplishment of the unlawful purpose, take the life of the assailant. See this question ably and exhaustively discussed by Judge CLARK in the *Alford* case, 8 Tex. Ct. App. 545.

The defendants were convicted of murder in the second degree. This conviction, and the judgment thereon, are not supported by the evidence. Horr. & Thomp. Self Def. 717.

The other points raised by counsel in their very able brief will

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not be discussed, believing that the principles above stated, if properly applied, will suffice.

For the errors above indicated, the judgment is reversed and the cause remanded.

Judgment reversed and cause remanded.

LOONEY V. STATE.

(10 Tex. Ct. App. 590.)

Criminal law — larceny — kleptomania.

Where kleptomania is set up in defense to a charge of larceny, the court should specifically charge in regard to this species of mania, and not leave the case to the jury on the general test of ability to distinguish right from wrong. (*See note, p. 648.*)

CONVICTION of larceny. The opinion states the case.

J. R. Peel, for appellant.

H. Chilton, assistant attorney-general for State.

WINKLER, J. This appeal is from a judgment of conviction of theft of property over the value of twenty dollars. From the evidence and the charges of the court, given and refused, we are led to conclude that the only defense relied on in the court below was kleptomania, and if there was error in the charge of the court, and prejudicial to the rights of the defendant, under this defense and the testimony on that subject, such error is to be found in applying the facts to the general subject of insanity, rather than in applying it directly and specifically to the peculiar condition of the defendant's mind developed by the proofs; and in this respect we incline to the opinion that the charge, taken as a whole, was defective in not giving to the jury a special charge on the subject of this peculiar symptom, as it relates to the general subject of insanity.

It is said that kleptomania occurs not unfrequently as a symptom in mania and the mental confusion incidental to it, and in depression and delirium, in which its consideration involves less difficulty. But where it occurs in cases of concealed insanity, its discovery is not easy. Wharton & Stille's Med. Jur., § 192. To our minds,

what has been said by Ellinger and quoted in the authority just cited, in the nature of practical directions, may well be considered in connection with the case and the subject under consideration, not as law but as illustrating the propriety, if not the necessity, of a charge to the jury on this peculiar feature of the case,—as follows:

“1. In the earlier developments of mania, kleptomania is an important symptom; it will however be found accompanied more or less by other symptoms of incipient derangement, such as a general alteration in the accustomed mode of feeling, thinking, occupation and life of the individual, a disposition to scold, dispute and quarrel, to drink, and to wander about busily, doing nothing, and the bodily signs of excitement (restlessness, want of sleep, rapid pulse, etc.). 2. Kleptomania continues after the disease, to all external appearances, has ceased. Here the disease also has not yet terminated, which can only be indicated by a return of the original state of thought and feeling. (This calls for a continued course of observation by the examining physician.)

“3. There are distinct but occult hallucinations at work. These are to be assumed the more readily the more bizarre and exclusive is the desire to steal, and the more the objects to which it is confined are out of proportion to the property of the thief; and particular attention should be paid to the existence, present and past, of other symptoms of insanity.” An instance of this inordinate propensity to steal is cited in this connection from Dr. Rush, who says, “In one instance a woman was exemplary in her obedience to every command of the moral law, except one,—she could not refrain from stealing.” We make these further quotations from this authority, as indicative of this peculiar symptom of insanity. “It would be difficult to prove directly that this propensity, continuing as it does through a whole life, and in a state of apparently perfect health, is notwithstanding a consequence of diseased or abnormal action in the brain, but the presumptive evidence in favor of this explanation is certainly strong. First, it is very often observed in abnormal conformations of the head, and accompanied by an imbecile condition of the understanding. * * * An instructive case has been lately recorded in which this propensity seems to be the result of a rickety and scrofulous constitution.”

We mention these peculiarities in order to show the fact that kleptomania is a recognized symptom of mania, in some of its recognized forms at least, and to illustrate the importance — this being

the peculiar defense,—of embracing in a general charge on the subject of insanity, this peculiar symptom,—a feature of the present case to which proper attention seems not to have been paid on the trial below, and which in our opinion would have been more fully developed if the attention of the jury had been called more pointedly to this feature of the defense.

Other questions are presented by the record and have been discussed in argument, but are not considered by this court, not that they are unimportant or immaterial, but because if they are errors they are susceptible of easy correction on another trial. Because of what we deem a material defect in the charge, as above indicated, the judgment will be reversed and the cause remanded for a new trial.

Reversed and remanded.

NOTE BY THE REPORTER.—Precisely the same ruling was made in *Erwin v. State*, 10 Tex. Ct. App. 700, where *delirium tremens* was set up in defense of murder. The court said: "A party laboring under this species of insanity, not being responsible for his acts committed while thus deceased, and the evidence in this case tending to form this issue, it was the duty of the learned judge, in his charge, to have clearly and pertinently set forth the principles of law applicable to this defense. This was not done in that clear and distinct manner required by the now well-settled principles of law." "The charge of the court upon the only issue in this case, that upon which the defendant relied for an acquittal, to wit, insanity, is as follows: 'You are further instructed that where a defendant is accused of crime, placed on trial, and the plea of insanity is interposed, the inquiry the law requires in such cases is not as to the amount of intellectual capacity of the accused, or in other words, the law does not look to or inquire whether an accused party is possessed of a little or a great mind. It is the quality and not the quantity of the mind that the law looks to. If a man is in possession of a sound mind, has merely sufficient mental capacity to know right from wrong, to know and comprehend the nature and consequences of his own acts, the law holds such party accountable. On the other hand a man may be in the possession ordinarily of that which would be termed a great mind, still if such person, during a period of actual insanity, violate the law, such person would in law not be a subject for punishment, and in such case it is in law immaterial what the cause of said insanity may have been. But in law insanity and mere drunkenness are two things distinct one from the other. While insanity exonerates from all punishment, mere drunkenness neither mitigates nor justifies. If a man of his own volition voluntarily becomes drunk, and during a fit or spell of even great intoxication, does an act, he cannot in such case plead drunkenness as an excuse. The law will not allow a sane man to shield himself from the consequences of his own acts on the ground that such sane man of his own accord and of his own will chose to become even beastly drunk. No mere temporary condition of the mind, brought about by a fit or mere spell of drunkenness, however great such drunkenness may be, is in law an exoneration or excuse for crime.'

"This charge, so far as the defense of the defendant is concerned, is negative in its character. There is no direct, affirmative application of the law to his theory of defense. It is true that the jury are told that if they believe that the defendant is *actually insane*, he would not be amenable. This is very general, including every species of insanity. The evidence tending, whether strongly or otherwise, to establish *delirium tremens*, the charge should have explained that species, and applied the legal principles thereto. This should have been done clearly, distinctly and affirmatively. Again the charge makes the test of insanity depend upon whether the defendant knew right from wrong generally. The test is now settled to be, whether the defendant knew the act charged to be wrong; if so, he is punishable."

See *Andersen v. State*, 43 Conn. 514; s. c., 31 Am. Rep. 609; *Hawes v. State*, ante, p. 383.

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SARTAIN V. STATE.

(10 Tex. Ct. App. 651.)

Criminal law — sentence — expiation — statutory construction.

The defendant was sentenced to one hour confinement in the penitentiary. A statute provided that terms of imprisonment should commence from the time of sentence. At the expiration of an hour, the defendant not having been removed to the penitentiary, applied for discharge on *habeas corpus*. Held that he was not entitled to it. (*See note, p. 652.*)

CONVICTION of bigamy. The opinion states the case.

J. H. McLeary, attorney-general, for State.

WHITE, P. J. Appellant was convicted upon a charge of bigamy, and his punishment was assessed by verdict and judgment at one hour's imprisonment in the State penitentiary. Sentence was pronounced upon him in accordance with the judgment. An hour or more after sentence was pronounced, he applied to the District judge for a discharge upon writ of *habeas corpus*, — claiming his right to discharge by virtue of the latter clause of art. 825, Code Crim. Proc. (act Feb. 21, 1879), which provides that "the term" (of imprisonment) after conviction and sentence in a felony case "shall commence from the time of sentence." Upon hearing of the writ the District judge refused to discharge, but remanded appellant to the custody of the sheriff, to be kept until he could be conveyed by the legally constituted authorities to the penitentiary, there to be confined in compliance with the judgment. From this order and judgment he appeals here.

The question is, does the statute invoked apply to a case of this kind, and was the defendant entitled to be discharged though the judgment and sentence had never been executed upon him, simply by virtue of the fact that his term of imprisonment had expired if it should be counted from the date of the sentence? In other words, it is insisted that a term of imprisonment can expire before there has ever been any imprisonment, and that a judgment can be executed without in fact ever having been executed. To state the proposition is to manifest its absurdity, and in passing the act

referred to (art. 825) the legislature could never have intended such an absurdity, or rather could never have intended to defeat the very object of the penal law by depriving it of its power to enforce its judgments. One of the very objects of the Code of Criminal Procedure is declared to be "the certain execution of the sentence of the law when declared." Code Crim. Proc., art. 1, subdiv. 6.

In felony cases "a final judgment is the declaration of the court entered of record, showing" among other things "that the defendant be punished as it has been determined by the jury in cases where they have the right to determine the amount, or the duration and the place of punishment, in accordance with the nature and terms of the punishment prescribed in the verdict." Code Crim. Proc., art. 791, subdiv. 10.

Art. 792. "A sentence is the order of the court made in presence of the defendant and entered of record, pronouncing the judgment and ordering the same to be carried into execution in the manner prescribed by law."

Art. 820. "Immediately after final sentence shall have been pronounced the convict *shall be conveyed to the penitentiary*," etc. "The sheriff shall deliver the convict * * * to the superintendent of the penitentiary." Art. 824. Felonies less than capital are punished by *imprisonment in the penitentiary*. Penal Code, art. 54. The punishment for bigamy is "*by imprisonment in the penitentiary* for a term not exceeding three years." Penal Code, art. 324.

In the very nature of things there can be no incarceration in the penitentiary without an actual imprisonment within its walls. But it is insisted that there is neither exception to the operation nor ambiguity in the language used in the statute invoked,—the language being "the term shall commence from the time of sentence, or in case of appeal from the time of the affirmance of the sentence by the Court of Appeals." Code Crim. Proc., art. 825. "It will be found to be an established rule in the exposition of statutes that the intention of the lawgiver is to be deduced from a view of the whole and of every part of the statute, taken and compared together." * * * And "where the intention of the legislature is not apparent to that purpose, the general words of another and later statute shall not repeal the particular provisions of a former one. 'It cannot be contended,' says Lord KENYON, 'that a subsequent act of Parliament will not control the provisions of a prior statute if it were intended to have that operation; but there are several cases in

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the books to show that where the intention of the legislature was apparent that the subsequent act should not have such an operation, then, even though the words of such statute taken strictly and grammatically would repeal a former act, the courts of law, judging for the benefit of the subject, have held that they ought not to receive such construction.'” Potter’s Dwaris, p. 110.

“ Courts are not confined to the literal meaning of the words employed, in the construction of statutes, but as was said in *Burgett v. Burgett*, 10 Rep. 221, the intention of the law-makers may be collected from the cause or necessity of the act; and statutes are sometimes contrary to the literal meaning of the words. It has been decided that a thing within the letter was not within the statute unless within its intention. The letter is sometimes restrained, sometimes enlarged, and sometimes the construction is contrary to the letter. 4 Bac., title Statute, 1, §§ 38, 45, 50. Every statute should be construed with reference to its object, and the will of the law-makers is best promoted by such a construction as secures that object and excludes every other.” *Castner v. Walrod*, 83 Ill. 171; *Walker v. State*, 7 Tex. Ct. App. 245; s. c., 32 Am. Rep. 595.

CHASE, C. J., in *Griffin’s* case, says: “On the other hand a construction which must necessarily occasion great public and private mischief must never be preferred to a construction which will occasion neither or neither in so great degree, unless the terms of the instrument absolutely require such preference.” Chase’s Dec. 364. And in *Missouri Mutual Life Ins. Co. v. King*, 44 Mo. 283, it was held, “Generally where words used in a statute are clear and unambiguous there is no room left for construction; but where it is perceived that a particular intention, though not precisely expressed, must have been in the mind of the legislator, that intention will be enforced and made to control the strict letter.”

Now applying these principles, it certainly never could have been intended by the legislature to exempt entirely from punishment and imprisonment in the penitentiary any citizen who, after having violated the law, was fairly tried and condemned, and sentenced to such punishment for his crime. It could never have been intended that a party condemned to the penitentiary could claim that he had expiated his imprisonment when in fact he had never been imprisoned. It could not have been intended that all previous laws pertaining to the conviction, or rather the punishment, of convicted felons should

be repealed. The obvious construction of art. 825 is simply this, that when a party is condemned to the penitentiary for any term of months or years he must be imprisoned in the penitentiary, but after he has reached and been actually confined in said penitentiary, the term of his imprisonment may be estimated to begin from the date of sentence.

To hold otherwise would be to relieve felons, such as appellant in this case, to a certain extent from the disgrace and the disabilities of actual imprisonment in the penitentiary, which is as much a part and parcel of the punishment as the term of imprisonment.

We see no error in the judgment, and it is affirmed.

Judgment affirmed.

NOTE BY THE REPORTER. — Two other ingenious attempts at evasion of imprisonment may be noted. In *People ex rel. Stokes v. Warden of Prison*, 66 N. Y. 342, the prisoner having been convicted, got a new trial nine months afterward, lying in jail meanwhile. On the second trial he was sentenced to imprisonment for four years. This imprisonment commenced in November, 1873. In February, 1875, he brought *habeas corpus* for discharge, on the ground that he should be credited with the nine months' imprisonment, and that this, with the time he had served, and the allowance he had earned for good conduct, filled out his time. His application was denied. The court said: "Punishment for the commission of crime is that pain, penalty or forfeiture which the law exacts, and the criminal pays or suffers for the offense. In legal view, it cannot be said to have been exacted, nor to have been endured or begun to be endured, until the commission of the particular crime has been legally determined, and the particular criminal legal liability ascertained; nor until the due sentence, that is, the judicial fixing and utterance, of the definite kind, amount, or period of punishment has been authoritatively, and in due form of law and proceeding, pronounced upon him for his crime, after his conviction therefor. Punishment is a consequence of crime, to be sure, but in a legal view, it is the immediate consequence of only a conviction of crime. Hence, any pain or penalty which the offender has suffered before conviction and before sentence has been pronounced upon him is illegal, or is due to some demand of the law other than that based upon his conviction. In either case, it fails to inure to his benefit as part of that due punishment which the law exacts, by reason of his conviction and of the sentence passed upon him.

"Again, as a general rule, from which this case is not an exception, no pain or deprivation which a person suffers in accordance with law, can be made, as of his right, to answer at once two distinct and different requirements of the law. The imprisonment of the relator in the county jail was by virtue of one requirement of law, to wit: that persons indicted for murder may be kept in close custody until their trial therefor is ended. It was for that reason a lawful imprisonment. It could have been, for that reason, justified by the keeper of the county jail. It was a satisfaction, then, of that specific legal exaction, quite another exaction than that by virtue of this sentence, and it was a satisfaction of that other legal exaction only; when after that arose the legal exaction by virtue of the sentence upon this conviction, the imprisonment which the relator had undergone in answer to that other requirement, had been applied and spent in satisfying it, and may not be now applied in satisfaction of this later demand of the law. The learned counsel for the relator admitted, upon the argument, that the imprisonment in the county jail was legal and that the relator could not have obtained a discharge therefrom. That period of imprisonment was then appropriated and consumed by some demand of the law, other than the conviction of October 29, 1873, and the sentence thereupon, and does not now exist, so as to be applied in satisfaction of the latter. Moreover, important parts of the

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sentence are the place of imprisonment, to wit: in a State prison, and the manner of detention there, to wit: at hard labor. When the relator lay in the county jail, he was not enduring these parts of the sentence; he was not in State prison; he was not at labor. How then can the time he lay in the county jail be reckoned a part of the time for which the law adjudged him to be at labor in the State prison? Doubtless, a court when imposing sentence of imprisonment may consider in mitigation of the severity of it, the time for which the convict has been in custody while awaiting trial. And this is the only force of the instances brought forward by the learned counsel. It is matter of discretion only, and the discretion is exercised upon that fact, the same as upon any of the circumstances of the case which may be urged upon the court for mitigation of punishment."

In a very recent case of *Edwards* in New Jersey, the prisoner, sentenced to ten years' imprisonment, escaped and was recaptured after seven years. On the expiration of the ten years he brought *habeas corpus* for discharge, but VAN SICKLEN, J., held that he must make up the time of his absence, citing *Cleek v. Com.* 21 Gratt. 777; *State v. Cockerham*, 2 Ired. 304; *Ex parte Clifford*, 29 Ind. 106; *Dolan's case*, 1 Mass. 209; *Hollon v. Hopkins*, 21 Kans. 638. In the last case the court said: "But as Hollon was not rearrested or imprisoned in the penitentiary until after the term for which he was sentenced had apparently expired, was his rearrest and is his imprisonment lawful? We think both were and are lawful. We do not think that the proceedings had prior to the sentence, nor even the sentence itself, so far as its essentials are concerned, were exhausted by lapse of time. The only way of satisfying a judgment judicially, is by fulfilling its requirements. Of course if Hollon had died or been pardoned, the sentence would be at an end. But as these things have not happened, and as the sentence has not been disturbed by any judicial decision or determination, there is no way of satisfying its requirements or of exhausting its force except service by Hollon of the required time in the penitentiary. It has often happened that a judgment sentencing a person to be executed capitally on some particular day, has not been fulfilled on that day. A reprieve has been granted, an escape effected, some unforeseen event preventing it has occurred, or the officers from some cause have failed to perform their duty, and the convict has for the time being escaped punishment. But in no case, so far as we are informed, has it been held that the convict was thereby freed from all punishment, or that he could not be executed on some subsequent day."

"The essential portion of a sentence is the *punishment*, including the *kind* of punishment and the *amount* thereof, without reference to the time when it is to be inflicted. The sentence, with reference to the kind of punishment and the amount thereof, should as a rule be strictly executed. But the order of the court with reference to the time when the sentence shall be executed is not so material. The time when a sentence is to be executed is usually fixed by an order of the court; but it is not always necessary, as will be seen from the authorities, that it should be thus fixed. Where the punishment ordered is imprisonment in the penitentiary, and where the time for the imprisonment to commence is fixed by the court, the imprisonment will usually be deemed to have commenced at the time ordered by the court, unless the convict by his own wrong has prevented it; and where the time for the commencement of the imprisonment has not been fixed by the court, the imprisonment will usually be deemed to have commenced on the day of the sentence (*Ex parte Meyers*, 44 Mo. 230), unless the convict by his own wrong has prevented it. But in no case will the term of imprisonment be deemed to have commenced prior to actual imprisonment, unless the actual imprisonment has been prevented by some cause other than the fault or wrong of the convict.

"In the present case the court sentenced Hollon to be imprisoned in the penitentiary 'for the period of three years,' less five days. The court also designated the time when such 'period' should commence. Now according to the authorities, the amount of the imprisonment prescribed by the court is material, and inheres in the sentence; but the time when the imprisonment should commence is comparatively immaterial, and technically does not belong to the sentence. It is so immaterial that courts are not bound to hold that the imprisonment actually or in law did commence at the time when the court said it should commence, if in fact and by the convict's own wrong it never did commence."

In *People v. Lincoln*, 35 Hun, 306, the defendant was sentenced, on the 13th of April, 1880, for misdemeanor, to six months' imprisonment in the county penitentiary. She was

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confined in the county jail until June 1, 1890, when she sued out *certiorari*, and was let to bail and remained on bail till August 28, 1890, when her bail surrendered her, and she was confined again in the jail until September 28, 1890, when she was removed to the penitentiary and there confined until December 28, 1890, when she was discharged. It was held on review, that "the sentence began to run from the day it was pronounced, and that all the time the respondent was in custody after that day is to be credited upon her sentence. * * * She was enduring the sentence when in custody after the sentence was pronounced." The case of *People v. Warden, etc.*, was distinguished on the ground that there "the imprisonment which the court refused to credit upon his sentence was such as he suffered before trial and conviction and sentence."

EX PARTE ROGERS.

(10 Tex. Ct. App. 655.)

Criminal law — conspiracy — jurisdiction.

Where a conspiracy to forge titles to land in Texas was formed in Texas, and one or more overt acts were committed there, but the actual forgery was committed in another State by an agent or co-conspirator, the courts of Texas have jurisdiction of the offense.

HABEAS CORPUS. The opinion states the case.

Bethel Coopwood and *J. H. Stewart*, for appellant.

Horace Chilton, assistant attorney-general, and *H. M. Holmes*, for State.

WHITE, P. J. [Omitting other inquiries.] Without undertaking to give even a substantial synopsis of the facts testified by the witnesses on the stand, it is sufficient to say that with certainty enough to show a strong probability of the complicity of the appellant in the steps preliminary to the execution of the forged instrument in Chicago, it was testified that the conspiracy to manufacture the bogus title to the Gritten league of land in Travis county, was entered into in the city of Austin, and this appellant was a party to it; that appellant furnished from Austin the *fac simile* of the signature of Gritten, the certificate of John P. Kale, county clerk of Polk county, subsequently used in the execution of the forged instrument, and certain bogus seals; and that the instrument was forged *for* and at the request of the appellant, was

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returned to appellant at Austin, and by him, acting through his partner in this transaction, was placed on record in Travis county.

These facts being shown by the State, the question for our solution is this : Was the offense charged in the indictment complete in the State of Texas, when the agent completed the performance of his part of the conspiracy in Illinois, in pursuance of the common design, originated and entered into in Travis county, Texas, to forge the deed of conveyance in question ? If this proposition can be answered in the negative, then the plea to the jurisdiction of the Texas tribunal must prevail ; otherwise it is of no force.

The case of *Commonwealth v. Harvey*, 8 Am. Jur. 69, is one in which the defendant, a resident of New York, forged a draft in Albany and placed it in the hands of a broker there to be forwarded to Boston, Mass., where it was paid and the proceeds remitted to the defendant, who did not, during these transactions, leave the State of New York. He was indicted in the State of Massachusetts for the utterance in that State of the forged draft, and though he was shown to have committed the offense through an agent, the broker, who likewise resided in Albany, and outside the State of Massachusetts, he was held amenable in the latter State, was tried, over an objection to the jurisdiction of Massachusetts courts, was convicted, and the conviction sustained. As relied upon by the prosecution in the case of *The People v. Adams*, 3 Denio, 190, the adjudication in *Harvey's* case was assailed vigorously by counsel for the defense as enunciating a principle alike dangerous and unwarranted, and establishing a precedent whereunder a defendant might be held liable to two different jurisdictions for the same offense. But though insisted upon with consummate zeal and ability by counsel, the court, in the *Adams* case, in which the issue decided was that the personal presence at the place where the crime was committed was not essential to constitute the offender a principal, did not concur with counsel, or hold that the adjudication in the *Harvey* case was obnoxious to the weight of authority ; and the doctrine enunciated in *Harvey's* case, as applied to the *Adams* case, prevailed.

It would be difficult indeed to imagine a case which, in its prominent features, could be more directly in point than the Massachusetts case referred to. In that case the common-law principle *qui facit per alium facit per se*, which is of universal application both in criminal and civil cases (3 Conn. 8), was recognized, and the

court maintained jurisdiction over the offense though the paper was forged outside the limits of the State, and was uttered from the place where forged and through the instrumentality of an agent who likewise lived where the paper was forged. The issue in that case was the utterance of a forgery in Boston. It was uttered from Albany, New York, through the medium of an innocent agent, and the defendant was held guilty in Massachusetts. Its criminal intent was to affect the laws of Massachusetts. The issue in this case is the forgery of an instrument designed to affect the laws of this State. Like the utterance in *Harvey's* case, it was forged from abroad—from Chicago—through the instrumentality of an agent or co-conspirator; the State in this instance resting its position upon the stronger ground that it was likewise forged in pursuance of a previous conspiracy between the agent and the defendant entered into in this State, to do a criminal act, to be consummated here, and which in its results was to effect a vicious purpose in this State only.

Commonwealth v. Gillespie is a strong case in point, and thoroughly sustains the doctrine announced in *Harvey's* case. See 7 S. & R. 469. This was a prosecution sustained in a Pennsylvania court against a citizen of New York, for selling lottery tickets in Philadelphia through an agent. In asserting the jurisdiction of the Pennsylvania court, the learned judge who delivered the opinion pertinently remarked: "For the law would be a dead letter—we would become the laughing stock of our sister States, either for the inaccuracy and little foresight of our law-makers, or for the imbecility of those employed in their administration, if such a procedure as this was not brought within the law; if our neighbors from New York or Baltimore could levy a revenue in this State by the employment of a child or slave." * * * "It must be recollected, the conspiracy is a matter of inference, deducible from the acts of the parties accused, done in pursuance of an apparent criminal purpose, in common between them, and which rarely are confined to one place; and if the parties are linked in one community of design and of interest, there can be no good reason why both may not be tried where an overt act is committed."

Conspiracy in this case is not a matter of inference, but a matter of direct testimony. Of the overt acts leading up to the consummation of the criminal enterprise, the procuration by the defendant

Ex parte Rogers.

of the *fac simile* of the forged signature was one, of the certificate of authentication was another, of the spurious seals was another, the furnishing of the same to the agent or co-conspirator was another; and when the agent, by the act of forgery at the request of and for the use and benefit of the defendant, committed his part of the criminal design in Chicago, and forwarded the instrument to the defendant in Texas, the offense, in our opinion, was complete in Texas, and strengthened when the defendant received the same and had it put upon record.

In *Com. v. Corlies*, the question is elaborately argued, and the principle we have stated is supported. See 3 Brewst. 575, citing *People v. Mather*, 4 Wend. 229; Archb. Cr. Pr. 6; *Com. v. Tack*, 1 Brewst. 511; *King v. Brissac*, 4 East, 174; citing *King v. Bowes*, id. See also *King v. Johnson*, 6 East, 583; 7 id. 65; *Rex v. Muntion*, 1 Esp. 46; *Barkhamsted v. Parsons*, 3 Conn. 8; *U. S. v. Davis*, 2 Sum. 485; 21 Wend. 528 to 541.

The last subdivision of chapter 5, book 2, p. 104, §§ 104 *et seq.*, Bishop's Crim. Law (4th ed.), demonstrating the correctness of the principles upon which the question is decided in this opinion, presents more forcibly than we can hope or expect to, the reason of the rule, and indicates clearly the fallacy of the arguments, which not only in this but in all of the adjudicated cases cited, have been urged in opposition, and a careful perusal of that discussion *in extenso* will suffice to show the peculiar force of the doctrine. It is commended as a fair and satisfactory exposition of the rule of law that must govern the question, founded alike upon common sense and common justice.

The recognition of the principle contended for by the appellant would not only be to disregard the letter and spirit of the law as we find it, but to recognize a principle fraught with the greatest evil and mischief. It would be to authorize the unscrupulous, through foreign agents, to prey upon the substance of our citizens, free from immunity and in contempt of the privileges and rights vouchsafed the people by the Constitution.

The conspiracy to appropriate the Gritten land was deliberately concocted in the city of Austin, and the defendant was, according to the evidence, a deliberate party to that conspiracy, and in prospective its chief beneficiary. In furtherance of that design the *fac simile* of the signature, necessary to evidence the pretended act of conveyance, was surreptitiously obtained in Austin by defendant

himself, as were also the certificate of authentication and the field notes of the survey, and everything, in short, save the ink and perhaps the paper necessary to the commission of a grave offense against the laws of this State, to be consummated here and to inure to the special benefit of the defendant, was done by him here; and when the agent in Chicago completed and performed his part of the general design, the offense was complete in this State.

We have thus endeavored to support the jurisdiction of our State court in this case upon general principle and authority, because the question has thus been argued by learned counsel. Suppose for the sake of argument however that the authorities cited above fail, when strictly considered, to maintain the position (and we admit that none of them are in all respects entirely analogous), still we are of opinion, that when our statute itself is examined, it will be found amply sufficient to cover completely and fairly the question of jurisdiction, and to establish beyond cavil the liability of defendant to answer for his crime in the courts of our State. These statutes are in exact harmony with the views above expressed.

[Omitting this consideration.]

It is unnecessary to prolong the discussion. We have given the questions presented in this appeal that careful, deliberate consideration their importance demanded, and we are of opinion the court below did not err in its judgment refusing to discharge the applicant under the writ of *habeas corpus*; and the judgment is therefore affirmed.

Affirmed.

CASES
IN THE
SUPREME COURT
OF
VERMONT.

MORRILL V. MORRILL.

(58 Vt. 74.)

Surety,— security to, available to creditor.

An infant's guardian executed a mortgage as security to a surety on his bond.

Held, that the infant was entitled to the benefit of it as security for what was due from the guardian.

BILL for foreclosure. The head-note and opinion show the facts.
The bill was dismissed below.

L. H. Thompson, for oratrix.

John Genug and Crane & Alford, for defendant.

POWERS, J. [Omitting other questions.] This mortgage being valid as between Morrill and Bates, can this oratrix, being the beneficiary under the bond, executed by Morrill and Bates, make it available as a security to her for the amount due from her guardian? The mortgage was executed to Bates as an indemnity only. In

some States a distinction seems to have been drawn between cases, where the security is given for indemnity only, and where it is given both for indemnity to the surety, and to secure the debt. Where it is given as security for the debt as well as indemnity, there would seem to be little doubt that the creditor, whether cognizant of the assignment and its purpose, or not, at the time of the assignment, could, when it came to his knowledge, avail himself of it as effectually, on maturity of his debt, as he could, had it been assigned to him directly.

But when the assignment is for indemnity only, some courts have held that the surety's right to apply the security as he pleased is inconsistent with the idea of a trust in favor of the creditor; and that the creditor can only reach the security by way of subrogation after the surety has been damnified, actually or constructively. *Rankin v. Wilsey*, 17 Iowa, 463; *Carpenter v. Bowen*, 42 Miss. 28; *Hopewell v. Bank*, 10 Leigh, 206.

The great weight of authority however is against the proposition, that the creditor's right is rooted in the doctrine of subrogation. The assignment of security by the principal to his surety is an appropriation of funds for the ultimate discharge of the debt, for which he is holden. The surety has the right to apply the security directly to the payment of the debt. If the surety pays with his own funds, *he keeps his principal's debt on foot* against him, and then applies the security to its payment. Thus in any event the funds of the principal are made to satisfy the principal's debt, and this accords with the purpose of the principal, when he gave the security. If the surety, after the assignment of the security, becomes insolvent, or by any act of the creditor is discharged from liability, he holds the security in trust for the creditor. *Cullom v. Br. Bank*, 23 Ala. 797; *Clark v. Ely*, 2 Sand. Ch. 166.

The clear deduction from the cases is, that an assignment of securities by the principal to his surety for indemnity merely, raises an implied trust in favor of the creditor, which, on maturity of his debt, he may enforce, whether the surety has been damnified or not, and irrespective of the question whether the surety or principal, either or both, are insolvent. *New Bedford Inst. for Savings v. Bank*, 9 Allen, 175; *Kramer's Appeal*, 37 Penn. St. 71; *Rice's Appeal*, 79 id. 168; *Seibert v. True*, 8 Kan. 52; *Ohio Life Ins. Co. v. Ledyard*, 8 Ala. 866; *Moore v. Moberly*, 7 B. Mon. 299; *Curtis v. Tyler & Allen*, 9 Paige, 432; *Ten Eyck v. Holmes*, 3 Sand. Ch.

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428; *Parris v. Hulett*, 26 Vt. 308; 1 Story Eq. Jur., § 499 (Redfield's ed.); Brandt Suretyship, § 283.

Here the principal and surety are both insolvent, and the liability of the surety has been fixed by judgment; but we regard these facts important only as they seem to intensify the equity of the oratrix.

[Omitting a matter of practice.]

The result is that the oratrix is entitled to have the Bates mortgage stand as a security to her for the payment of the sum due her from the defendant Morrill, as her guardian, as fixed by the Probate Court; and to a decree of foreclosure thereof against the defendants; and so far as she receives payment from, or under such decree, the estate of Bates is to be discharged from liability under said bond. The *pro forma* decree of the Court of Chancery is reversed, and the cause is remanded with direction to enter a decree for the oratrix in accordance with the views herein expressed.

MERCHANTS' NATIONAL BANK OF ST. JOHNSBURY V. WEEKS.

(53 Vt. 115.)

Executor and administrator — power of administrator to pledge.

An administrator is personally liable on his note for money borrowed for the estate, and cannot be decreed to appropriate the funds of the estate to its payment, although he is bankrupt.*

BILL for sequestration. The opinion states the facts. The bill was dismissed below.

A. M. Dickey & Son, for the orator.

Belden & Ide, for defendant.

REDFIELD, J. This case was heard on demurrer to the orator's bill. The bill avers, in substance, that the orator loaned money to the defendant as administrator of Nehemiah Weeks' estate, and

* See *Powers v. Douglass*, *post*; compare *Carter v. Manf. Nat. Bk. of Lewiston* (71 Me. 448), 36 Am. Rep. 598; *McGrath v. Barnes*, (18 S. C. 328), 36 Am. Rep. 687.

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took his note for the loan ; that defendant has assets in his hands belonging to the estate of Nehemiah Weeks sufficient to pay this debt ; that defendant is personally poor, and in bankruptcy. Hiram Weeks, admr., is the sole party.

I. There is no one interested as heir, creditor or otherwise, in the assets of this estate made parties ; or in position to protect the assets of the estate from being perverted and misappropriated by the administrator. The administrator is bound to take the possession, and care of property of the intestate, and appropriate the same under the direction of the Probate Court. He has no legal power or right to *borrow* money, and pledge the property of the estate in payment ; and not having the power to bind the property of the estate, he binds himself. The bill then in its aim and purpose seeks to obtain a decree, appropriating the assets belonging to the heirs of the intestate to pay the private and personal debts of the administrator. This is not a proceeding in due course of law, to distribute a portion of the estate to a person on whom right or title is cast by law. There is no party defendant, that represents the heirs, or has an interest to protect the estate, or resist its sequestration. If there were equity in the bill, the court would not proceed to a final decree, unless the parties in interest were before the court. But we think there is no sound equitable ground for relief. If the orator "supposed" that the administrator had the legal right to borrow money and pledge the assets of the estate for its payment, he was mistaken in the *law*, and it was his misfortune, and not a ground for relief. It is said that the money borrowed was used by the defendant for the benefit of the estate. If the administrator pays money improperly, caring for the property of his trust, whether the money is borrowed or comes from his own pocket, it is the proper province of the Probate Court to reimburse the administrator, by crediting such disbursements in his administration account ; and the sureties in his official bond have an equity, superior to any creditor of the administrator, to diminish, or prevent their liability for a *devastavit* of the estate. And we think the Probate Court possesses every equitable power that could properly be exercised by this court ; and this court will never interfere with matters appropriately belonging to probate jurisdiction, except in aid of that court.

In *Luscomb v. Ballard*, 5 Gray, 405, the court say : "The law is that by a promise, the consideration of which arises after the

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death of the intestate, the estate cannot be charged, but that the administrator is personally liable in his contract. And whether the amount is to be repaid from the estate is a question for the Court of Probate in the settlement of his account." See also *Sumner, Admr., v. Williams*, 8 Mass. 162; 5 Am. Dec. 83; *Taylor v. Mygatt*, 26 Conn. 184. In *Freeman v. Holt*, the Supreme Court of this State held the same doctrine, Windsor county, 1879. The case of *Field v. Wilbur*, 49 Vt. 157, relied upon by the orator, has not much analogy to this case. The defendant Wilbur, in that case residing in Georgia, held in trust a small farm in this State. He employed orators to build a barn on this farm. The bill was brought to charge the property with the cost of building the barn. The court, Ross, J., say: "Usually third persons, making such improvements at the request of the trustee, are confined to their personal surety against the trustee. There are exceptions to this rule. When the trustee resides abroad, as in this case, and has no property that the orators can reach, and when the trust property has been enhanced in value and made more productive, by the expenditure and labor of orators thereon, we think the orators have the right to have their improvements on the property made a charge on the property and its income." And the court decreed that the *trust* property be charged, not for the cost of the barn, but "only for such sum as the trust property has been enhanced in value by the erection of the barn." The Court of Equity had the sole jurisdiction in that case. In this case the estate is in due course of settlement and distribution in the Probate Court, which has special and exclusive jurisdiction, by law. The decree of the Court of Chancery is affirmed, and cause remanded.

Decree affirmed.

McCONNELL V. MERRILL.

(58 Vt. 149.)

Limitation — statute of — payment procured by surety out of principal's funds

Where a surety procured a compulsory payment out of the funds of the principal and promised to pay the balance of the debt, *held*, sufficient to arrest the running of the Statute of Limitations.

ACTION on a note made by Merrill as principal and Worthley as surety. The opinion states the fact. The defendant had judgment below.

John H. Watson and J. K. Darling, for plaintiff.

Farnham & Chamberlin, for defendant.

BOYCE, J. The only question presented by the exceptions is whether the evidence offered of the payment made and indorsed upon the note November 19, 1877, would prevent the running of the Statute of Limitations as against the defendant Worthley. The payment offered to be shown was made from the proceeds of the property of the defendant Merrill, and the legal effect of the payment as affecting the defendant Worthley would depend upon the circumstances under which it was made. The plaintiff offered to show that after this writ was brought and Worthley's property had been attached, he applied to the plaintiff to bring a second suit, and have the property of Merrill attached and sold, and the proceeds applied upon the note, and verbally promised that he would pay all the expenses of the second suit, and of the sale of the property that might be attached in the same, have the proceeds indorsed upon the note, and would pay the balance that might remain due upon the note, saying that he wanted the suit brought for his own benefit; that plaintiff finally consented that the suit might be brought; that property of Merrill was attached and sold upon the writ, and the whole of the proceeds of the sale indorsed upon the note November 17, 1877, by Worthley's direction. The court ruled as matter of law that these facts if proved would not prevent the running of the statute as against the defendant Worthley; they would not amount to such a payment by Worthley as would prevent the running of the statute.

This we hold was error. The payment was made by the procurement of Worthley and for his benefit, and was made under such circumstances that the creditor had a right to rely upon it as a payment made by him for the purpose of arresting the running of the statute. It is not necessary that the payment should be made from the funds of the party making it. Here the payment made was not a voluntary payment by Merrill, but was compulsory, and was procured to be made by Worthley; and the payment thus made,

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when accompanied by the promise of Worthley that he would pay the balance of the debt that might remain due, we think the creditor had a right to consider it as a payment made by Worthley. This view in our judgment harmonizes with the spirit and intent of the statute, while the adoption of the construction claimed by the defendant would operate as a fraud upon the plaintiff, and be in conflict with the theory of the law pertaining to the defenses of actions from lapse of time.

This case is clearly distinguishable from *Bailey v. Corliss*, 51 Vt. 366. There the payment relied upon was a voluntary one. The defendant acted as the agent of the party making it, and informed the creditor at the time he handed him the money, whose it was, and what disposition he was requested to make of it, so that there was nothing in the conduct of the defendant that had a tendency to mislead the creditor, or to induce the belief that he intended to assume any new responsibility, or to waive any legal right.

The judgment is reversed and cause remanded.

Order reversed and cause remanded.

EASTERN TOWNSHIPS BANK V. BEEBE.

(58 Vt. 177.)

Judgment — foreign — merger.

A foreign judgment does not merge the cause of action, but an action may be maintained on the same cause in another State. (*See note, p. 667.*)

ACTION on notes. Defense, a Canada judgment on the same notes. The defendant had judgment below.

John Young and Crane & Alfred, for plaintiff.

Edwards & Dickerman, for defendant.

BARRETT, J. It is not claimed that the pendency of said suit in Canada, when this suit was brought, could bar a recovery in this suit. It is claimed that the judgments in said suit in Canada rendered after the bringing of this suit, bar a recovery in this suit.

It is not averred or claimed that said Canadian judgments have been satisfied by payment. So the only question is, whether said Canadian judgments merge the cause of action, in such a sense as to render it incapable of being the subject of a judgment in this suit.

It is not so merged unless it has become a debt of record, so that the record itself has become a cause of action, of its own vigor, to be declared upon as such, and when produced, is conclusive of the right. All the authorities agree that a suit in Vermont, for getting satisfaction of the Canadian judgment, must be an action of assumpsit, counting upon an implied promise, arising from the fact of the existence of such judgment.

It is held in the cases that a foreign judgment, when shown in evidence upon a matter within the jurisdiction of the court, and in which the court had jurisdiction of the parties, so that they were personally bound by the judgment, in the country where rendered, is conclusive upon the matter therein adjudicated. But it at the same time is held that the original cause of action is not so merged by that judgment that it is incapable of being the subject of a suit in a country foreign to that in which the judgment was recovered.

The books are uniform in making the distinction between *merger* of the cause of action and conclusiveness of effect, as matter of evidence, when the effect of a foreign judgment is brought in question in a suit upon the same original cause of action.

Whatever may be the reason for such distinction, it exists, and is established as a rule of law; and we see no occasion for annulling that rule in this State. In the many cases in which the subject of judgments as between the different States of the Union has been discussed and determined, the theory and logic have rested upon the provision of the U. S. Constitution, as to the faith and credit to be given to judgments of one State in the other States; and in all the cases it is assumed that but for such provision such judgments would not have that faith and credit, and would be foreign judgments. A specimen case of this kind is *McGillivray v. Avery*. 30 Vt. 538, in which the very able opinion drawn up by Judge BENNETT presents the established doctrine, and marks the true distinctions.

It is fundamental that a foreign judgment does not constitute a record debt, but is only *evidence* of obligation to pay. The indebtedness evidenced by a foreign judgment as a cause of action to be

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declared on, as the ground of recovery is that of *simple* contract, and the subject for a suit in *assumpsit*. In this case then the judgment in Canada as a *cause of action*, is of no higher grade than the notes themselves. The legal fact is conclusive against the idea of the notes as a cause of action being merged by that judgment. It leaves that judgment as an instrument or means of evidence, showing conclusively the fact of indebtedness, and operating conclusively to that effect until satisfied. It is not judgment, but the satisfaction of it, that renders it a bar to a recovery in the domestic government upon the original cause of action. This is in harmony with the conclusive effect given to a foreign judgment in favor of the defendant. The fact of such judgment is pleaded in bar, and is adduced as evidence to maintain that plea. This is the same *mutatis mutandis*, as adducing the fact of a foreign judgment for the plaintiff to maintain his right of recovery against the defendants in his action of *assumpsit* upon that judgment. The confusion on this subject seems to result from not distinguishing between a domestic judgment as constituting of itself a *debt of record*, and a foreign judgment, which is only evidence of an indebtedness as upon a simple contract.

Judgment reversed and cause remanded.

NOTE BY THE REPORTER.—In *Hall v. Odber*, 11 East, 118, Lord ELLENBOROUGH said : "Judgments in foreign courts are not to be considered upon the same footing as judgments in our own courts of record ; they are but evidence of the debt, they do not bar or stay an action on simple contract ;" and LE BLANC, J., said : "A foreign judgment is no merger of a simple contract debt ;" and BAYLEY, J., said : "A foreign judgment did not extinguish or merge the plaintiff's simple contract debt, which can only be done by converting it into a debt of a higher nature." So when the action was on two counts, one of a foreign judgment, the other on the account on which that judgment was rendered, although execution was stayed by the judgment, yet a recovery was allowed on the account of which the judgment was evidence.

The same doctrine was expressed in *Bank of Australasia v. Harding*, 9 C. B. 661. WILDE, C. J., said : "But in England the colonial judgment, which stands upon the same footing as a foreign judgment, is not a security of a higher nature than the prior simple contract debt. The principle of merger therefore does not apply."

In *Smith v. Nicolls*, 5 Bing. N. C. 238, to an action of trover defendant pleaded a judgment for the same cause of action in Sierra Leone. *Held*, *bad*. BOANQUET, J., said : "The judgment of a foreign court however amounts only to an agreement on which an action of *assumpsit* will lie, but does not constitute a debt of a higher order."

The same doctrine is expressly held in *Lyman v. Brown*, 3 Curt. 559 ; and is implied in *Phillips v. Hunter*, 3 H. Bl. 402.

Mr. Freeman says (Judg., § 606) : "If there was now any reason why in order to be consistent with themselves, the courts should hold that a foreign judgment was operative as a merger of the original cause of action, that reason has certainly become more imperative since the dignity and importance of those judgments have been so recognized and enforced by the latest adjudications of courts of last resort in England and in this country. While a defendant, who succeeded in defeating a claim at law or in equity in the courts of

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any foreign country, could always avail himself in the common-law courts of this adjudication in his favor, as a complete plea in bar to another action involving the same demand; and while under the most recent decision the principle of *res judicata* is enforced in favor of the plaintiff as well as of the defendant in a foreign judgment, yet the law of merger has never been applied as against the plaintiff in such a judgment, and he is both in England and America, unquestionably entitled to disregard the judgment in his favor, and sue upon the original cause of action."

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(53 Vt. 208.)

Marriage — divorce — agreement of separation.

In an action by a wife for divorce for cruelty, an agreement for separation made two years before, after the acts of cruelty, and after actual separation, and substantially complied with by the husband, is a valid defense. (*See note, p. 670.*)

ACTION for divorce. Defense, an executed agreement for separation. The opinion shows the facts. The defendant had judgment below.

Gilbert A. Davis, for petitioner.

John F. Deane, French & Southgate, for libellee.

VEAZEY, J. This is a libel for divorce on the ground of intolerable severity, and was dismissed by the County Court, that court holding that the contract entered into between the libellee and the father of the libellant, acting in her behalf, after the separation, operated a defense to the petition for the cause alleged, which had accrued before the contract was made.

[Omitting a question of practice.] The question as before stated is as to the effect of this contract, under the circumstances disclosed upon this petition for divorce. It will be noticed that this contract was entered into after the separation and through the intervention of a person acting for the wife. It is not the policy of the law to encourage separations between husbands and wives. The rules as established in many cases is, that articles calculated to favor a separation which has not yet taken place will not be

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supported. *Durant v. Titley*, 7 Price, 577; *St. John v. St. John*, 11 Ves. 526; *Westmeath v. Westmeath*, Jac. 126.

But as stated by COOLEY, C. J., in *Randall v. Randall*, 37 Mich. 563: "When a separation has actually taken place, or it has been fully decided upon, and the articles contain a suitable provision for the wife and children, or an equitable and suitable division of the property, the benefits of which both have enjoyed during the coverture, no principle of public policy is disturbed by them; on the contrary, if they are fair and equal, and are not the result of fraud or coercion, reasons abundant may be found for supporting them, in their tendency to put an end to controversies, to prevent litigation, and to give the wife an independence in respect to her support, which without some such arrangement she could not have under the circumstances." Among the numerous cases that have settled the law as stated, may be found the following: *Compton v. Collinson*, 2 Bro. Ch. 377; *Worrall v. Jacob*, 3 Meriv. 266; *Jee v. Thurlow*, 2 B & C. 547; s. c., 4 D & R. 11; *Blokar v. Cooper*, 7 S. & R. 500; *Hutton v. Hutton*, 3 Penn. St. 100; *Dillinger's Appeal*, 35 id. 357; *Nichols v. Palmer*, 5 Day, 47; *Baker v. Barney*, 8 Johns. 73; 5 Am. Dec. 326; *Shelihar v. Gregory*, 2 Wend. 422; *Carson v. Murray*, 3 Paige, 483; *Chapman v. Gray*, 8 Ga. 341; *Wells v. Stoul*, 9 Cal. 494; *Guines v. Poor*, 3 Met. (Ky.) 503; *Walker v. Walker, Exr.* 9 Wall. 743. This contract is therefore one of a character that the court may recognize for some purposes. It is not necessarily and utterly void. In this case it is not invoked by the defendant as a bar to the restitution of the libellant to any of her conjugal rights. The separation grew out of trouble between the husband and wife. The alleged cause of divorce then existed in her favor, if it existed at all, and was known to her. In this situation, and after the separation, she, through the intervention of a trustee, agreed upon the terms as to property upon which she would live separate from her husband. This property (including the money specified in the contract), except, as is claimed, a portion of household furniture, was delivered or paid to and accepted by the trustee in her behalf. After all the other provisions as to what property and money she was to have, it was further provided in the contract as follows: "And the said parties further agree, to and with each other, that they will not molest, disturb or trouble each other, or in any way publish or speak or circulate slanderous matter of or concerning each other, but live separate and apart in a quiet and peaceable

way, according to the true intent of these presents." He has substantially performed on his part, and she has received the benefits. The question about the household furniture seems to be one of difference as to what the contract covered in that respect, not a refusal to perform by the husband. The contract was not strictly a condonation of alleged wrongs. The wife, instead of forgiving her husband upon promise of better treatment, agreed with him upon terms of separation, which were satisfactory, and no complaint is now made in regard to them. Nearly two years afterward this petition was brought.

In the English Ecclesiastical courts it is held that a voluntary deed of separation between husband and wife is not *per se* a bar to a suit for a restitution of marital rights or to a petition for divorce. *Durant v. Durant*, 1 Hagg. 733 (3 Eng. Ecc. R. 310); 1 Bish. Mar. & Div., § 634, and n. 3. But there are other cases where the deed, taken in connection with the circumstances under which it was given, and under which the application for divorce was made, and with the conduct of the parties, was held to constitute a defense, and the application was denied. *Mathews v. Mathews*, 1 Swabey & Trist. 499; *Williams v. Williams*, 35 Law Jour. Rep., pt. 5, 85, decided in 1866. We think this case belongs to that class where the parties should be held to their own settlement; and that the deed of separation under the circumstances is a good defense to this petition. See *Brown v. Brown*, 5 Gill, 249; *Hunt v. Hunt*, 31 Law Jour. Rep. (N. S.) pt. 1, 161; *J. G. v. H. G.*, 33 Md. 401.

The judgment of the County Court is affirmed.

Judgment affirmed.

NOTE BY THE REPORTER.—In *Rogers v. Rogers*, 4 Pal. 516; 27 Am. Dec. 84, it was held that an agreement for separation made pending a suit for separation was invalid, and furnished no ground for ordering a discontinuance of the suit. In *Anderson v. Anderson*, 1 Edw. Ch. 890, it was briefly held that a deed of separation is no bar to a suit for divorce.

In *Wilson v. Wilson*, 40 Iowa, 280, a voluntary separation was held no defense to a claim for alimony on divorce. The same was held in *Müller v. Müller*, Saxton, 386.

In *Mathews v. Mathews*, 1 Swa. Trist. 499, it was held that the lapse of some nine years, "taken in connection with the deed of separation," made three years before, showed a want of good faith, and the petition was dismissed. In *Williams v. Williams*, 35 L. J. Rep. (N. S.) Pt. 5, 85; *Mathews v. Mathews*, *supra*, was precisely and briefly followed. In *Hunt v. Hunt*, 31 L. J. Rep. (N. S.) Pt. 1, 161, the converse phase of the question was carefully considered, and the lord chancellor, reversing the decision of the master of the rolls, held that a deed of separation would afford a ground for enjoining a suit by the husband for restitution of conjugal rights. *J. G. v. H. G.* 33 Md. 401, holds that a voluntary deed of separation is not a bar to an action for divorce for impotence. Citing the *Mathews*,

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Williams, and *Hunt* cases, *supra*, and *Durant v. Durant*, 3 Eng. Ec. 310; *Beeby v. Beeby*, id. 38; *Westmeath v. Westmeath*, 4 id. 288; *Spering v. Spering*, 3 Swa. Trist. 211. (The latter case was for restitution of conjugal rights, and the petition was granted, the court distinguishing *Hunt v. Hunt* on the ground that the separation there was by formal deed, which was lacking here.) And distinguishing *Brown v. Brown*, 5 Gill. 249, on the ground that the deed there amounted to condonation.

It seems that the weight of authority is against the principal case.

GOODAL V. GODFREY.

(53 Vt. 219.)

Easement — way — when implied on severance.

Where the real estate of a deceased person is divided among his heirs by proceedings in the Probate Court, a right of way of necessity may be implied from one part to another, and where appurtenant to a part set off for dower, it does not cease with the widow's death, but passes to a grantee or purchaser.*

ACTION of trespass on real estate. The opinion shows the facts. The defendant had judgment below

Gardner & Harman, for plaintiff.

T. Sibley and *J. K. Batchelder*, for defendant.

VEAZEY, J. The question in this case, upon the undisputed facts is, whether in the division of the tavern property, after the decease of Jacob Lyons in 1844, a right of way was set out by implication to the middle tenement around the adjoining east or west tenement.

The plaintiff's counsel, relying on the distinction recognized in the books between what are called apparent and continuous easements and discontinuous easements, the former being defined to be those which are constant and visible, without any act of the individual in their use, and the latter, those which are only observable in their exercise, which is occasional, insist that a right of way is not such an easement as ever arises by implication except in cases of absolute necessity, as where premises are "land-locked."

* Compare *Mitchell v. Settel* (53 Md. 251), 36 Am. Rep. 404, and note, 415.

In *Harwood v. Benton*, 32 Vt. 733, BARRETT, J., says, referring to Gale & Whately on Easements, ch. 5: "It is laid down as an unquestioned proposition, that upon the severance of a heritage, a grant will be implied of all those continuous and apparent easements which have in fact been used by the owner during the unity, though they have had no legal existence as easements."

In that case the owner of a mill and an artificial pond with the surrounding land, granted a parcel of such surrounding land, not bounded on the pond, by warranty deed, with no expressed reservation therein of any right to flow the same; and it was held that by his deed he did not part with the right to flow such land as he had formerly flowed it.

The learned judge after referring to the use to which the owner had subjected the surrounding lands for the convenience of the mill, says: "This then was a palpable and impressed condition, made upon the property by the voluntary act of the owner; and we think, that without any stipulation in the deed upon the subject, the true view of the law is that the grantee took the land which he purchased in that impressed condition, with a continuance of the servitude of that parcel to the convenience and beneficial use of the mill."

There has been much controversy both in England and America, as to whether in the severance of a heritage by a grant of a parcel of it, any easement except one of *strict necessity* passes or is reserved by *implication*. The authorities upon the subject are cited and discussed in Washburn's Easements and Servitudes, ch. 1, § 3. The learned author finally says, p. 74 (3d ed.): "Thus, in some cases, rights of way are treated as non-apparent easements; in others the mode of enjoying them gives them the character of being apparent. But there is one test which may be applied to all cases of grants of one or two tenements, in determining whether an easement or servitude is created in respect to either by an implied grant or reservation, and that is the reasonable necessity of such an easement to carry into effect the purposes of the grant." And again on page 95 (3d ed.), he says: "It would seem, that in cases of a division of an estate consisting of two or more heritages, whether an easement or convenience which may have been used in favor of one, in or over the other, by the common owner of both, shall become attached to the one or charged upon the other in the hands of separate owners, by a grant of one or both of those parts, or upon a par-

tition thereof, must depend, where there are no words limiting or defining what is intended to be embraced in such deed or partition, upon whether such easement is necessary for the reasonable enjoyment of the part which claims it as an appurtenance. It must be reasonably necessary to the enjoyment of the part which claims it, and where that is not the case it requires descriptive words of grant or reservation in the deed to create an easement in favor of one part of a heritage over another."

It is plain that a right of way to the rear of the middle tenement, around one end of the tavern building, was reasonably necessary to the enjoyment of it. The garden in the rear was on an average, according to the plan referred to in the exceptions, about nine rods long by nearly two rods wide. The building covered the whole front of the middle tenement, there being about twenty-five feet wide. The occasion for a drive-way to the rear appears to have been what the ordinary convenience of such a tenement requires. Without going over the part set to the east or west tenements, being now the plaintiff's land, such a drive-way could be obtained only by removing a portion of the building, practically destroying it. There was a drive-way in use all round the building, while Jacob Lyons owned and occupied it as a tavern; and this use continued after his decease as before. This drive-way was twelve and one-half feet wide east of the building; and was defined by the building on one side and a fence on the other. With this impressed, visible, defined way in use for the obvious convenience of the whole building, the commissioners made the division between the widow and daughters. In the absence of any thing to show why a way was not provided for the convenience of the middle tenement, it seems very singular that the commissioners should have omitted it unless they understood one would be created by implication. It appears to have been deemed important, for some reason not explained, that the west tenement should have a right of way around the east end of the building. It is plain that this would not exist without express provision; therefore the commissioners made such provision. The necessity to make express provision for a way for the east tenement apparently arose from the fact that it seems to have been deemed desirable to have it go right through the barn belonging to the middle tenement. Therefore no inference can be drawn against the claim of an intended way by implication for the middle tenement, from the express provisions for a way for the other two tene-

ments. After the partition in 1846, the widow and daughters occupied one or the other of said tenements, renting the other two; and they and their tenants always used the drive-way around the house for the convenience of all the tenements; and this continued for nearly thirty years, and was the obvious condition and enjoyment of use when the plaintiff bought the east and west tenements in 1875, and until after the defendant and others bought the middle tenement in 1877.

A right by implication sometimes arises in a case of a partition between heirs, when it would not arise in a case of a conveyance of one part of a heritage. In *Brakely v. Sharp*, 2 Stockt. 206, the intestate owned two farms at his death, with a house on each; and had constructed an aqueduct from a spring upon one of them to both these houses. Upon his death the farm, upon which was the spring, was set to the widow and one heir, and the other farm to the other heir. The question arose as to the effect of this partition upon the right which the owner of the second farm had to those in connection with his house, in the benefit of this aqueduct. The chancellor held that if the ancestor, while owning both farms, had conveyed to a stranger the one which was set to the widow, he would have lost all benefit of the aqueduct as an easement, if he had not expressly reserved it in his deed; but the widow and heir did not stand in the light of purchasers from the ancestor. All the heirs came in with equal rights; and no preference arose from mere priority of assignment. See *Collins v. Prentice*, 15 Conn. 39; *James v. Plant*, 4 Ad. & E. 749; *Buswell v. Hobson*, 12 Gratt. 322; *Kilgour v. Ashcom*, 5 Harr. & J. 82; *Turringham's case*, 4 Rep. 36; *Seymour v. Lewis*, 13 N. J. Eq. 439; *Elliott v. Sallee*, 14 Ohio St. 10. We think this is a case where the owner had created and impressed a peculiar quality to the different parts of his estate, so that one portion became, as the building was constructed, visibly dependent upon another for the means of access thereto. As the learned judge says in *Harwood v. Benton*, *supra*: "This condition of the estate was obvious, and had been continuous, and was of a character showing that it was designed to continue thereafter as it was in fact done." Therefore when the partition took place it was a partition of the estate as it then was, and carried by implication the same right of access to each part over the other as had theretofore been plainly and obviously enjoyed, so far as was reasonably necessary for the enjoyment of

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each part. *Janes v. Jenkins*, 34 Md. 1; *Lampman v. Milks*, 21 N. Y. 505; *Durel v. Baisblane*, 1 La. Ann. 407; Washburn Easem. and Serv. 75 (3 ed.) and cases cited in note 2; *Thompson v. Miner*, 30 Iowa, 386; *Morrison v. Marquardt*, 24 id. 35; *Leonard v. Leonard*, 7 Allen, 277; *Pearson v. Spencer*, 1 B. & Sm. 580; s. c., 3 id. 761; *Phillips v. Phillips*, 48 Penn. St. 178.

If Jacob Lyons in his life-time had divided the tavern property as the commissioners did, and then sold the east and west tenements to the plaintiff without reservation of a right of way for the middle tenement, then it might be argued; upon strong authority, that he did not retain such right of way by implication, because it would have been in derogation of his grant. Although it may have been held that there is no distinction in legal effect between what has been called an implied grant and an implied reservation, such a distinction has been recognized in many well-considered cases. See *Suffield v. Brown*, 9 L. T. Rep. (N. S.) 627 and 4 De G. J. & S. 185; *Wheeldon v. Barrows*, L. R., 12 Ch. D. 31; *Brakely v. Sharp*, *supra*.

Under this distinction Jacob Lyons would not retain a way by implication for the middle tenement in a sale of the east and west tenements, but would convey one by selling the middle tenement and retaining the others. This distinction is only alluded to, not passed upon. These premises were divided between the heirs by commissioners, just as Jacob Lyons left them, having a visible way all around the building for the convenience of the whole. There was no priority of assignment or grant. There was indeed no grant in the sense in which that term is used in the cases, where it is held that a grantor shall not derogate from his grant. It was a division of the property as it stood, under the law; not a sale. Therefore, to give that division such construction as to secure what seems not only so reasonable, but so important to the beneficial enjoyment of the middle tenement, would be, as we think, but carrying out what the commissioners intended, and what the case fairly shows the heirs understood. The construction is to be determined not on the ground of necessity alone, but by the acts of the parties and in the light of circumstances. As stated by MORTON, J. in *Nichols v. Luce*, 24 Pick. 102: "It is not the necessity which creates the right of way, but the fair construction of the acts of the parties;" and by WAITE, J., in *Collins v. Prentiss*, 15 Conn. 39: "In strictness the necessity does not create the way, but merely furnishes evidence as to the real intention of the parties;"

and again, page 425, when the same case was before the court a second time: "It arises from a fair construction of deed as to the presumed intent of the parties." These cases were cited with approval by BARRETT, J., in *Tracy v. Atherton*, 35 Vt. 52; and are referred to as showing upon what considerations a way is upheld where it is not expressly set out in a petition.

As the heirs, to whom were set the east and west tenements, took them subject to this servitude, they could convey no more than they received. Therefore when the plaintiff bought, he took the east and west tenements subject to a right of way to the rear of the middle tenement for its benefit, either by the east or west route. He may have had the right to select which should be used. This he very plainly did when he blocked up the west route.

The plaintiff claims that if there was a way by implication for the middle tenement in the division of the estate, it was appurtenant to the widow's life estate, and ceased with it. We do not think that the way in question was simply appurtenant to the freehold estate of the dowager. See *Summers v. Drew*, 21 Pick. 278; *Brakely v. Sharp*, *supra*.

As the widow and her daughters, to whom the other tenements were set out, were living together and continued so to live, occupying one tenement and another after the division, there was no necessity of the way as a convenience to the widow personally. The necessity for the convenience of the middle tenement has already been shown. That necessity would continue the same after the termination of the life estate. We are aided by no words of grant or reservation; but are to give construction to a partition in the light of facts and circumstances. In *Hoffman v. Savage*, 15 Mass. 130, the earliest and leading case, to which we have been cited, where it was held that the way was but appurtenant to the freehold estate of the dowager, and expired with it, a piece of land was assigned to the widow as her dower, "and the privilege of a passage way for bringing in wood." These words plainly indicate the restricted purpose of the privilege assigned.

The use of the way in question continuing for so many years for the convenience of the middle tenement, not only while the mother and both daughters lived, but after the decease of Laura in 1867, who devised all her property to her sister Eunice; also after the decease of the mother in 1870, when the middle tenement reverted to her children and so remained until 1875, when Eunice and her

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husband conveyed the east and west tenement, and her two-fifths interest in the middle tenement to the plaintiff, and when another heir conveyed to him another fifth; and this use being palpable under all the different ownerships, and unquestioned from 1846 until 1877, indicates at least that it was the understanding of these parties that this way was an appurtenant of the middle tenement. And although the plaintiff owned the whole of the east and west tenements and the three-fifths interest in the middle tenement from November, 1875, until April, 1876, when the administrator *de bonis non* of Jacob Lyons sold the middle tenement, it appears that the way was used the same as before the plaintiff's ownership; and the sale took place under those circumstances. Although it was not a sale by the plaintiff, it was a sale in a measure in his behalf. Had the plaintiff himself sold the middle tenement when owning the other two, and with this servitude visibly impressed and obviously being enjoyed as it was when the administrator sold, the case would have been clearly within the rule as announced in *Harwood v. Benton*, *supra*, and within the first general principle deduced from the cases by THESIGER, L. J., in *Wheeldon v. Barrows*, *supra*.

The facts of this case are peculiar but upon consideration of them in the light of adjudged cases, we think that by the weight of authority and upon settled principles they make a defense. Therefore as they are undisputed, the defendant was entitled to the judgment as it was in his favor in the County Court; which renders it unnecessary to examine or pass upon the charge of that court, to which exception was taken.

Judgment affirmed.

TOWN OF BALTIMORE V. TOWN OF CHESTER.

(58 Vt. 315.)

Settlement — residence — imprisonment.

Imprisonment in a State prison for two years for an offense not a felony does not of itself interrupt or terminate the prisoner's residence under the pauper law.

ORDER of removal under pauper law. The opinion shows the facts. The order was granted below.

Walker & Goddard, for plaintiff.

Wm. E. Johnson and *L. Adams*, for defendants.

VEAZEY, J. One question in this case is, whether the imprisonment of the pauper in question in the State prison interrupted his residence in Baltimore so as to affect his acquiring a settlement there. The case finds that he resided in Baltimore with his family from September, 1871, to May, 1877; and at the May Term of Windsor County Court, 1877, he was sentenced to the State prison for a term of two years for poisoning swine; and was confined in said prison for the term of his sentence, except two months which was deducted for good behavior. If this imprisonment did not interrupt his residence in Baltimore, then it was sufficient in time to gain a settlement there under the statute.

He was about eighty years old, and during his imprisonment his wife and son often visited him; and they continued their former residence in Baltimore the same as previous to the imprisonment; and after it terminated he returned to his wife and home in Baltimore, and resided there with her and his son until these proceedings were commenced.

In *Northfield v. Vershire*, 33 Vt. 110, it was held that imprisonment in jail on a charge of larceny did not interrupt a residence so as to prevent gaining a settlement. The reasons for that decision are fully stated by Judge POLAND in that case, and may as well be referred to, as to be restated here.

Is there any sufficient ground for distinction between imprisonment in jail, on a charge of crime, and in the State prison on conviction of an offense, not a felony, and sentenced for the term of two years, that should be held to affect the question of settlement?

We cannot adopt the views suggested in argument, that imprisonment in the State prison is voluntary because the prisoner voluntarily commits the crime upon which he is convicted. Absence from home on account of imprisonment in the State prison on conviction is certainly quite as compulsory in every sense, as on account of imprisonment in jail on a charge of crime.

But it is urged, that the prisoner in the State prison on conviction is civilly dead, and all his civil rights are forfeited; and that he is not regarded as having any civil existence during the term of the sentence. This was not the effect of imprisonment under sentence for crime in all cases at common law.

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A *dictum* of Lord Coke, Co. Litt. 130 a., that: "besides men attainted in a *præmunire*, every person that is attainted of high treason, petit treason, or felony, is disabled to bring any action, for he is *extra legem positus*, and is accounted in law *civilitur mortuus*," led Chancellor Kent to think, as he intimated in *Troup v. Wood*, 4 Johns. Ch. 228, that every person attainted of felony was accounted in law *civilitur mortuus*; but in a later case, *Platner v. Sherwood*, 6 id. 118, he said this *dictum* of Lord Coke "is not to be taken in the full latitude of expression," and after reference to other expressions of Lord Coke, Co. Litt. 132, a. b. 133 a.; 3 Inst. 215, he says: "The strict civil death seems to have been confined to the cases of persons professed, or abjured, or banished the realm, and I do not find that it was ever carried further by the common law." This view is well sustained by authority. See *Bannister v. Trussel*, Cro. Eliz. 516; *Ramsay v. Macdonald*, 1 Wils. 217; Foster Cro. Law, 61, 62, 63; *Coppin v. Gunner*, 2 Ld. Raym., 1572.

The term, civil death, as used in the books, seemed to involve, *first*, a total extinction of the civil rights and relations of the party, so that he could neither take nor hold property, but his estate passed to his heirs as though he were really dead, or was forfeited to the crown; and of this kind were the cases of monks professed, and abjuration of the realm. But profession was a creature of the ecclesiastical law, and the relinquishment of the estate was voluntary. 1 Domat. 25, art. 13. The species of civil death terminated when popery was abolished in England, and the monasteries taken into the hands of the king. Abjuration of the realm was abolished by the Statute of James I, ch. 28. *Second*, an incapacity to hold property, or to sue in the king's courts attended with forfeiture of the estate and corruption of blood; and the king took the property to the exclusion of the heirs. *Jackson v. Catlin*, 2 Johns. 262; 3 Am. Dec. 415; 1 Domat. 531, § 14.

There were cases in the English law, where the party was sentenced to perpetual imprisonment or perpetual banishment for an offense not attended with forfeiture of his estate. 2 Inst. 199. Stat. Westm. I, ch. 20; 2 Inst. 201, n. 10. Stat. Westm. II, ch. 35; 2 Inst. 437, 439. And it would seem that perpetual imprisonment or perpetual banishment, *without forfeiture of the estate*, did not in England produce civil death. Str. 872, Lord Raym., 1572.

As crimes do not work a forfeiture of the estate or corruption of

blood in this State, there is lacking that taint from crime which seems to have constituted at the common law one of the essential elements of civil death.

We have no statute defining generally what constitutes felony. Certain statutes declare that certain specified crimes shall be deemed felonies that were not felonies at the common law. The poisoning of swine was not a felony at common law, and is not declared a felony by our statute.

In *State v. Cooper*, 16 Vt. 551, which was an indictment for burglary under our statute making it burglary for any one in the night time to break and enter any dwelling-house, etc., with intent to commit the crime of "murder, rape, robbery, larceny, or any other felony," where the conviction was upon proof that the breaking and entering was with intent to commit adultery, judgment was arrested, and on the ground that at common law adultery was not a felony, and was not declared such by our statute.

We have statutes providing what shall be the effect of imprisonment for crime in certain respects. A life sentence operates as the natural death of a person, so far as it in any way relates to his marriage or the settlement of his estate. Gen. Stats., ch. 120, § 19. A sentence for three years or more is a cause for divorce. Ch. 70, § 18. For certain purposes the wife is deemed a *feme sole* while the husband is in State prison. Ch. 71, § 13. These seem to be all based on the principle that a prisoner's legal rights, subject to his personal restraint, are unaffected by the imprisonment, except as specially provided by statute. In England it is expressly provided in the Settlement Act, 9 and 10 Vic., ch. 66, § 1, that "the time during which such person shall be a prisoner in a prison, etc., shall be for all purposes excluded from the computation of time," etc., which by that act is five years. I have not found any English case where this was held as simply declaratory of the common law.

The plaintiff cites and relies on the case of *Reading v. Westport*, 19 Conn. 561, where it was held that the period of a person's imprisonment for crime does not constitute any portion of the successive residence requisite to his acquisition of a legal settlement by commorancy. That case differs from this, in that the prisoner left no family in the town to represent him, or continue his home. There were no facts upon which the court could properly base a finding that the pauper intended to continue his residence in the same town or return to it at the end of his term.

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Here we have the fact of a home and family continuing as before the imprisonment ; and as we hold a continuing purpose to return to it at the earliest moment practicable ; and a return to it in fact. Absences for purposes of business or pleasure, or by reason of sickness which might be as compulsory as imprisonment, so far as the power of the individual to return is concerned, do not interrupt a residence so as to prevent gaining a settlement.

It does not appear how the Connecticut court regarded imprisonment in jail on a charge of crime on this question. The reasoning of the learned judge in that case would apply as well to an imprisonment in jail as in State prison ; and those reasons were pressed upon the court in *Northfield v. Vershire, supra*. We do not criticise the determination of the Connecticut case upon the facts in it ; but the reasons suggested in the opinion of the court for the decision, which are now urged upon us, are not sufficient in our judgment to control this case upon its facts.

Where a pauper has a family and home in a town, and resides there at the time he is imprisoned, and the evidence is sufficient to show a purpose to continue such residence, and to return to it as soon as liberated, we think that his compulsory absence by reason of imprisonment for a limited term for such a crime as this was, though in the State prison, does not interrupt his legal residence in that town.

The plaintiff's counsel argue that it should be held otherwise because there is no way provided by statute for removal of a pauper while in prison. This argument would be appropriately addressed to the legislature, and is sometimes a proper subject of consideration by a court ; but it is not sufficient in this case.

The decision made of the question above discussed renders it unnecessary to pass on the other question presented by the exceptions.

Judgment reversed, and judgment that the pauper was unduly removed.

Judgment reversed.

PUTNAM V. FRENCH.

(53 Vt. 402.)

Agency — to sell goods — authority to collect pay.

An agent to sell goods, selling on credit, has implied authority to receive pay therefor, and the purchaser is not chargeable with constructive notice to the contrary by the words "payable at office," on the bill rendered. (*See note, p. 684.*)

ACTION on account. The opinion states the case. The defendant had judgment below.

Norman Paul, for plaintiffs.

Samuel E. Pingree, for defendant.

VEAZEY, J. It appears from the auditor's report that the plaintiffs are merchants in Boston, and the defendants are merchants residing and doing business in Hartford, Vermont. The goods in question were sold by the plaintiffs to the defendants through one Allen, who was in the employ of the plaintiffs as a "travelling salesman," and who made the contract of sale at Hartford, representing that he was a partner in the plaintiff firm. One of the terms of the contract was that the defendants might and should pay Allen for the goods at Hartford, when he should come around on his next trip in about three months. This was a substantial part of the contract to the defendants, as it was a matter of inconvenience and expense to them to pay in Boston. It was the custom in Hartford and vicinity either to pay the travelling salesman, or remit to the firm. The defendants paid this salesman, Allen, in accordance with the contract in good faith. The plaintiffs now seek to recover the amount of the bill again on the ground that Allen was not authorized or permitted to make collections. This restriction was not known to the defendants.

It is laid down by Judge STORY and other writers on the law of agency, and it is established by an unbroken line of authority, that the contract of an agent binds a principal in all cases, not only where the agent is acting within the scope of his usual employment, but where he is held out to the public, or to the other party, as

having competent authority, although he has, in the particular instance, exceeded or violated his instructions, and acted without authority. And this on the principle that where one of two innocent parties is to suffer, he ought to suffer, who misled the other into the contract, by holding out the agent as competent to act, and as enjoying his confidence. Story on Agency, § 443.

Allen being sent out by the plaintiffs as their travelling salesman, clearly had apparent authority, not only to take an order, but to make terms of payment as to time and place, to the extent at least of what was customary and not extraordinary.

The defendant had a right to rely upon Allen's making a truthful report of the terms of sale, and to suppose that the goods were sent pursuant to the contract as made. He was not their agent. The plaintiffs having taken the benefit of their agent's contract, which was one within his apparent authority, cannot be allowed to avoid some of its terms for the reason that he did not disclose them fully. It is just that they should suffer for his dishonesty in this respect, rather than the defendants.

It is further insisted by the plaintiffs' counsel that the defendants were charged with notice, that they must pay the plaintiffs and not Allen by reason of the words "payable at office," written on their bill rendered, when the last invoice was sent. The defendants did not see those words. Therefore they had no notice in fact. Should they be held chargeable with notice?

The plaintiffs sent that bill without any letter, when the goods were sent, which was three months before the time of payment agreed upon. The defendants examined it as to items charged, and amount of same, and filed it away—never noticing those words; and when Allen came around at about the time he was come for the pay by the terms of the sale, they paid him the balance due—supposing all the while that he was, as he claimed to be, a member of the firm.

In view of the obscure manner in which those words were written on the bill-head; and of the circumstances under which, and the purposes for which in other respects, that bill was sent, and of the terms of the contract as to whom and when and where payment was to be made, we do not think the defendants were guilty of such negligence in not seeing those words, as to be chargeable with notice which they did not in fact have.

It was a matter which the plaintiffs might easily have made plain.

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They saw fit to undertake to give the notice in an obscure way, which was likely to be ineffectual. It turned out so, and they should bear the consequences.

Judgment affirmed.

NOTE BY THE REPORTER. — In *Clark v. Smith*, 88 Ill. 236, it was held without expressed consideration, that authority in an agent to sell goods upon credit does not show an authority in him to receive money in payment, and unless the principal has held such agent out to another as having authority to collect, a payment to him is not good. 3 C. & P. 352, 1 M. & Rob. 326.

In *Capel v. Thornton*, 3 C. & P. 352, Lord TENTERDEN, held that an agent to sell has in the absence of advice to the contrary an implied power to receive payment. *Contra*, as to an agent to sell an estate. *Mynn v. Joliffe*, 1 M. & Rob. 326. But an agent to sell and convey, may receive payment. *Peck v. Harriott*, 6 S. & R. 149; *Yerby v. Grigsby*, 5 Leigh, 387; *Johnson v. McGruder*, 15 Mo. 365. But he cannot give the property away. *Dupont v. Wertheman*, 10 Cal. 325.

Hoskins v. Johnson, 5 Sneed, 469, is exactly in point and harmonious with the principal case.

BARRON v. TUCKER.

(53 Vt. 388.)

Contract — illegal — to induce discontinuance of criminal proceedings.

No action will lie for compensation for services in endeavoring to prevent an indictment, and after its finding in endeavoring to induce the public authorities to dismiss it.*

ACTION for services. The opinion states the case. The defendant had judgment below.

S. M. Pingree, for plaintiff.

S. E. Pingree, for defendant.

VEAZEY, J. Chancellor Kent lays down the rule that the consideration of a contract must, in order to entitle the party to recover, "not only be valuable, but it must be a lawful consideration, and not repugnant to law, or sound policy, or good morals. *Ex turpi contractu actio non oritur*; and no person, even so far back as the

* See *Buck v. First Nat. Bk.* (27 Mich. 293), 15 Am. Rep. 129; *Rhodes v. Neal* (84 Ga. 794), 37 Am. Rep. 93; *Haines v. Lewis* (54 Iowa 307), 37 Am. Rep. 304; *Riddle v. Hall*, Sup. Ct. Penn., Jan., 1882.

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feudal ages, was permitted by law to stipulate for iniquity." 2 Kent Com. *466.

In Smith on Contracts, page 141, the author says: "There is another remarkable instance of contracts falling under this class, namely, of illegality created by the rules of common law. It consists of contracts void because of having a tendency to obstruct the administration of justice." And he cites *Collins v. Blantern*, 2 Wils. 341; *Unwin v. Leaper*, 1 M. & Gr. 747; 39 E. C. L. R.; *Keir v. Loeman*, 6 Q. B. 316; 50 E. C. L. R.

There are numerous cases in the English and American reports, including those of Vermont, which illustrate the general rule that contracts are illegal when founded on a consideration *contra bonos mores*, or against the principles of sound policy; as where the consideration was the suppression of evidence in a criminal prosecution, *Badger v. Williams*, 1 D. Chip. 137; stifling a criminal prosecution, *Bailey v. Buck*, 11 Vt. 252; compounding of felonies or suppressing a criminal prosecution, *Hinesburgh v. Sumner*, 9 id. 23; *Bowen v. Buck*, 28 id. 398; sale of office, *Ferris v. Adams*, 23 id. 136; hired electioneering, *Nichols v. Mudgett*, 32 id. 546; "lobbying in the legislature," *Powers v. Skinner*, 34 id. 274. The law gives no countenance to an illegal contract.

Did the services of the plaintiff in this case come within the above rule? The defendant had been bound up for adultery; and the plaintiff's purpose was first to prevent an indictment; not because he believed the defendant was innocent, because the plaintiff had not much doubt of his guilt at any time, and he was confirmed in his belief of guilt after talking with the State witnesses. Neither is there any thing in the report to show that the plaintiff thought there were, or that there were in fact, any mitigating circumstances in the defendant's behalf, or any reasons existing why the law should not be enforced against him; nothing to show that the State's attorney, or the State witnesses, or the public generally, had any erroneous or extravagant views about the prosecution, or were disposed to be vindictive or oppressive therein, or had any ill-will toward the defendant. The sole purpose of the plaintiff's employment seems to have been to obstruct the administration of justice, either by inducing the State's attorney to hold back in the discharge of his duty, or the State witnesses to so tone down their testimony as to defeat the finding of an indictment. There is nothing in the report to indicate that the plaintiff, or any body else in that commu-

nity, felt called upon to interpose in the defendant's behalf in a friendly or neighborly way in the interest of justice or fair dealing. The report impresses us with the idea that the defendant sought the plaintiff's assistance, not as that of an attorney or neighbor or friend, but because he wanted a sort of "fugler" to circumvent or obstruct the due administration of justice; and that both parties were indifferent as to the methods. After having done what he could with the State's attorney and the State witnesses before the indictment, the plaintiff, after the indictment was found, was "very persistent in his effort to induce" the State's attorney to enter a *nolle prosequi*. "He tried him on the score of friendly relations existing between them; tried him by attempting to make him believe that the evidence was not sufficient to convict; tried him, to use the State's attorney's own words, 'by using all kinds of arguments.'" In *State v. Keyes*, 8 Vt. 57, it was held to be an indictable offense to attempt to induce a witness, on the part of the State, not to attend a public prosecution, even where such witness had not been served with a subpoena, but was known to be a material witness that was relied on. Chitty in his work on Contracts, vol. II., p. 998 (11th Am. ed.), says: "An agreement, the natural effect of which is, to induce a public officer to neglect his duty, is invalid;" and cites numerous cases.

The plaintiff's services in this case were unavailing to obstruct the administration of justice; but such was their purpose and natural tendency. They therefore do not constitute a legal consideration of a contract.

Although this case comes, as we think, under familiar principles of law, it is yet somewhat peculiar and novel in its facts; and in this decision we do not intend to trench upon the rights of respondents, or their friends and counsel in their behalf, in the use of all legitimate means of defense. The evident purpose of the plaintiff, and the necessary tendency of his services to obstruct justice, especially indicated by his persistently besetting the prosecuting officer, after the latter had become familiar with the facts, and the grand jury had found an indictment, distinguish the plaintiff's claim, and taint it with illegality.

Judgment affirmed.

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CARRIGAN V. LYCOMING FIRE INSURANCE COMPANY.

(63 Vt. 418.)

Insurance — fire — property for illegal sale — exception — knowledge of agent — representation of ownership.

An insurance of wines and liquors, as part of a stock of drugs and medicines and such merchandise as is usually kept in a country store, is not necessarily invalid as an insurance of liquors kept for illegal use.

Where the written part of a fire policy includes "drugs" and "such other merchandise as is usually kept in a country store," and the printed part excepts benzine without written permission, it is a question of fact whether benzine is permitted.*

If the insurer levied assessments and accepted premiums knowing that benzine was so kept, this will waive the provision, and the statement of the general agent when the policy was issued, that benzine was covered, is competent evidence of such knowledge, and is not affected by a provision in the policy that no agent had power to waive conditions without written authority.

An omission to mention a lien or a conditional sale, possession remaining in the vendor, is not a breach of a covenant to state if the ownership is other than entire.†

ACTION on fire insurance policy. The opinion shows the facts. The defendant had judgment below.

Redington & Butler, for plaintiff.

Proul & Walker, for defendant.

TAFT, J. The court directed a verdict for the defendants. The motion for such a verdict embraced four causes :

I. The defense claimed that the contract, and the claim under it, embraced liquors kept for sale contrary to law, and the fixtures used in such illegal traffic, which was carried on by the plaintiff ; and that by reason of such illegality the policy was null and void.

We think that a contract directly insuring liquors intended for illegal sale in violation of the law of this State is invalid. Such contracts are made in order to afford the assured protection in his illegal acts. **SHAW, C. J.**, says : " Where the direct purpose of

* See *Mears v. Humboldt Ins. Co.* (92 Penn. St. 15), 37 Am. Rep. 647; *Lancaster Fire Insurance Co. v. Lenheim* (80 Penn. St. 497), 33 Am. Rep. 778, and note, 781.

† See *Quarrier v. Peabody Ins. Co.* (10 W. Va. 507), 27 Am. Rep. 582.

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a contract is to effect, advance, or encourage acts in violation of law, it is void. But if the contract sought to be enforced is collateral and independent, though in some measure connected with acts done in violation of law, the contract is not void." *Boardman v. Merrimack M. Fire Ins. Co.*, 8 Cush. 583. This principle has been applied to contracts of insurance against fire, by the courts of Massachusetts, in several recent cases. In *Kelly v. Home Ins. Co.*, 97 Mass. 288, the policy was solely upon liquors and the casks containing them; and in *Johnson v. Union M. & F. Ins. Co.* and *Lawrence v. National Fire Ins. Co.*, 127 Mass. 555, upon billiard and drinking saloons, unlicensed, kept in violation of law. At the time the policies in these cases were issued, it must have been apparent to the insurers that the object of the contracts was illegal, unless the insured were duly licensed; and the cases do not show that any information upon that subject was sought for; and the insured would have had no cause for complaint, in case of loss, if the defendants insisted upon the illegal nature of the business as a defense. The same subject has been under consideration in Michigan; and the Supreme Court of that State, in a case almost identical with this, held that the policy was valid, stating, that to make the case analogous to those involving marine policies on unlawful voyages, and lottery insurances, which have been uniformly held null, would require the policy to be in express terms insuring the party selling liquors against loss by fire or forfeiture. In speaking of such marine and lottery policies, CAMPBELL, J., says: "These cases are not at all parallel because they rest upon the fact, that in each instance it is made a necessary condition of the policy that the illegal act shall be done. The ship being insured for a certain voyage, that voyage is the only one upon which the insurance would apply, and the underwriter thus becomes directly a party to an illegal act. So insuring a lottery ticket requires a lottery to be drawn in order to attach the insurance to the risk. But this insurance attaches only to property, and the risks insured against are not the consequences of illegal acts, but of accident. Our statute does not in any way destroy or affect the right of property in spirituous liquors, or prevent title being transmitted, but renders sales unprofitable by preventing the vendor from availing himself of the ordinary advantages of a sale, and also affixes certain penalties. If the owner sees fit to retain his property without selling it, or to transmit it into another State or country, he can do so. By insur-

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ing his property the insurance company have no concern with the use he may make of it, and as it is susceptible of lawful uses, no one can be held to contract concerning it in an illegal manner unless the contract itself is for a directly illegal purpose. Collateral contracts, in which no illegal design enters, are not affected by an illegal transaction with which they may be remotely connected. It is difficult to perceive how public policy can be violated by an insurance of any kind of property recognized by law to exist." *Niagara Fire Ins. Co. v. De Graff*, 12 Mich. 124. If the purpose of the contract in question had been to protect the assured in the sale of intoxicating liquors, it would have been null; but the greater part of the property insured consisted of goods, insurance upon which was subject to no objection. The contract was legal upon its face, nothing appearing to show that the wines and liquors were intended for illegal sale; and it is a fact not needing proof that in compounding medicines, liquors, especially wines and alcohol, are of daily use, and for that purpose their possession and use by druggists legitimate. The assured was a dealer in drugs and medicines, and in that respect legitimately and presumably using liquors. There was evidence tending to show that he illegally sold them, including those not used in compounding medicines; and the fact may have been, that the latter trade was the larger and his main one. If such illegal traffic was the business of the assured, and his legal traffic and transactions with other property a mere cover, ostensibly carried on for the purpose of enabling him to secrete and disguise his iniquity, the purpose of the contract would be to protect him in his illegal ventures, and it would therefore be void; but if he carried on business, using alcoholic liquors legitimately in his drug trade, and occasionally sold them in violation of law, we think that if no illegal design entered into the making of the contract in its inception, it would be so far collateral to the illegal acts that it would be inconsistent and in accordance with no well-adjudged case to hold it null. In *Boardman v. Merrimack M. Fire Ins. Co.*, *supra*, the policy was upon a building insured as a "shoe manufactory;" but it was during the life of the policy used in the drawing of a lottery. Now a policy insuring a building for the latter purpose would be null and void; but the court, by SHAW, C. J., held that its subsequent use for that purpose, by the consent of the assured, did not affect their contract with the insurance company; and the plaintiff recovered. The distinction is between the cases where the

contract is void in its inception, entered into for the purpose of protecting a prohibited traffic, and those cases where the contract is collateral, and into which no illegal design enters, although by the subsequent acts of the assured, it becomes remotely connected with illegal transactions. We think therefore that the case should have been submitted to the jury in accordance with the views herein indicated, for the purpose of determining the nature and design of the contract; and whether liquors were unlawfully sold or not.

II The property insured by one item of the policy was a "stock in trade consisting principally of groceries, provisions, drugs and medicines, fancy goods, and other such merchandise as is usually kept in a country store, including wines and liquors." This description is in what is called the written portion of the policy. It is provided in the printed portion that if the assured should keep benzine without written permission in the policy, then the policy should be void. Did the keeping of benzine, which is conceded, have that effect? The evidence had a tendency to show that at the time the policy was issued, the general agent of the defendant told the assured that benzine was covered by the policy; and there are two items of property insured, under either of which such might have been the fact, viz., "such other merchandise as is usually kept in a country store," and "drugs and medicines." If benzine is a *drug*, or is *usually kept in a country store*, then there was written permission in the policy, and it was insured by it; and in that event we do not think that any further written permission was necessary to enable the assured to keep it without rendering the policy null. If it was included in the terms used in the policy, then there was written permission to keep the article as fully as though the policy had read, "On benzine, etc.," *Niagara Fire Ins. Co. v. De Graff, supra*, in which case it was left to the jury to say, as a question of fact, whether the term, "groceries" included wines and liquors. Where the written and printed portions of a policy are inconsistent, the written portion prevails, as it expresses the special agreement and declared intention of the parties at the time of the contract, and the printed parts should be construed in a qualified sense, so as to confine them, as is said, to the "declared purpose and intention of the parties as expressed in the written clauses." This principle is too well settled to need the citation of authorities. Webster defines a drug, as including any mineral substance used in chemical operations; and the court cannot say

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that as matter of law benzine is not included in that term. This question, as well as the one whether benzine is an article usually kept in a country store, were proper questions for the jury, and should have been submitted to them if there was any evidence legitimately in the case upon either question. There was evidence that at the time the policy was granted the defendant's agent made statements that benzine was included in the policy; and we think this competent evidence legitimately tending to show that fact; it was the construction that the company itself put upon the terms used in the policy; and it would be rank injustice for them now, to escape a just liability upon any such pretext. If a company insures goods, using in the description of them general terms, and tells the insured that the description includes benzine, they should be estopped, in case of loss, from claiming that benzine is prohibited, not permitted upon the premises; that he cannot recover its value, and that its being there renders his insurance upon other property void, — an apt illustration of the old adage of “adding insult to injury.”

In case benzine was covered by the policy, the question raised by the defendant's counsel as to the power of the agent to waive any of the conditions of the policy does not arise, as the article itself was insured, and it did not require, to render the policy valid, a waiver of the condition which being printed is controlled by the written part of the policy. But in case the jury should find that benzine was not included in the property insured, the question arises as to the effect of a waiver by Mr. Francisco, should the jury find one shown. The policy contains a condition that *no agent* is empowered to waive any of its conditions without special authority in writing from the company; and the defendant insists that to permit it, without such authority in writing, is to violate the well-settled doctrine that written agreements cannot be altered in that manner. We are not inclined to depart from the doctrine that no parol stipulation, contemporaneous with the contract, can be shown to vary, add to, or contradict it. A court of law must act on the agreement as made by the parties; but it is a doctrine no less well settled that a contract not under seal can be changed by a subsequent parol undertaking, and in many instances the companies will be estopped from setting up claims in accordance with the contract as originally made, by having permitted the assured to act in the honest belief that the terms of the contract had been legally altered. The evidence of Francisco's statement that the assured might keep

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benzine, as showing that it was a part of the contract, would be clearly inadmissible, but as showing that the defendant had knowledge that it was kept by the assured, it was certainly competent, and if knowing this they subsequently treated the policy in force and levied assessments upon it, as the papers in the case show they did, until they had received in premiums quite a proportionate share of the face of the policy, we think it violates no rule of law to hold that the contract was changed by the subsequent acts of the parties. For another reason we think this clause in the contract is not applicable to any state of facts which the testimony has any tendency to establish. The person who has no power to waive any condition of the contract unless specially authorized in writing is an *agent*. There is as substantial a difference between agents transacting a local business, and who have certain limited powers, and general agents who have a supervision over the business of the company for large territories, and who are supposed to possess great experience and capacity and have an inspection of the business transacted by local agents, as there is between the president and secretary. And we think that the clause in question refers to *local* and not *general* agents, and that in the absence of proof to the contrary the latter are presumed to possess authority to transact all business relating to insurance, and the business of the company generally. The policy shows that Francisco executed it as general agent; he was general agent for the State; and we think it was not necessary to give validity to his acts in this respect, that he should be authorized in writing. As to the authority of general agents, see May on Insurance, 145. This authority has been very much enlarged within the past few years, and in this respect is about co-extensive with that of the company itself.

III. The policy was dated and originally issued on the 21st day of April, 1875, to Dennis F. Mullin and James Mullin. There is a provision in it that "if the interest of the assured in the property be any other than the entire, unconditional and sole ownership of the property for the use and benefit of the assured * * * it must be so represented to the company and so expressed in the written part * * * otherwise the policy shall be void." At the time the policy was issued the plaintiff held a lien upon an undivided half of the property, to secure a debt due him from James Mullin. This fact was not represented to the company; and the defendant claims that the policy was therefore void. This

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in our opinion depends upon the construction given to the words entire, unconditional and sole ownership. This latter word means the right to own, legal or just claim or title, proprietorship. If one holds the legal title to property, he is the owner, and he is no more so, by adding the adjectives, entire, unconditional and sole; he is as much the owner in one case as in the other. The fact that an incumbrance exists upon the property is not inconsistent with the fact that the assured is the owner or holds the legal title. In the connection in which the word, interest, is used, we think it is synonymous with title, the right to the property, the ownership of it; and it is settled by numerous cases that it is unnecessary to mention incumbrances and liens in answer to inquiries as to title or ownership. *Manhattan Ins. Co. v. Barker*, 7 Heisk. 503. And this view is confirmed by the fact that in the application for such contracts the inquiry as to the title is almost invariably followed by another as to the incumbrances upon the property, the plain inference being that information as to the latter inquiry is not expected in answer to the first. The question raised by the brief for the defendant is not the one made by the motion for the verdict, and not having been made below, will not be considered here. We think therefore that the policy was valid at its date; and this renders it unnecessary to pass upon the question of the effect of an assignment of a void policy.

IV. In October, 1878, the plaintiff became the owner of the insured property, and the policy was transferred to him by consent of the defendant, but the defendant claims that the ownership of the plaintiff was not properly represented to the defendant; that it was not the entire, unconditional and sole ownership, for his use and benefit, which the policy required. If it was not, then the policy was void. We think that admitting all that the testimony in the case has any tendency to show as to the right of the Mullins to any reconveyance of the property to them, the facts thus proved would not divest the plaintiff of his legal title and ownership of the goods, and his complete control of them in every respect. Until they had complied with the conditions entitling them to a reconveyance they would have no more interest in the goods than a stranger. The property in the goods was in the plaintiff and properly insured in his name. The case is nearly similar to *Boutelle v. Westchester Fire Ins. Co.*, 51 Vt. 4, and should be governed by the same principle.

Judgment reversed, and cause remanded.

Judgment reversed.

STATE V. DALEY.

(58 Vt. 442.)

Criminal law — evidence — character.

It is error to charge that a prisoner has a right to prove his good character "as a kind of make-weight in his favor if there is a pinch in the case."

CONVICTION of larceny. The opinion states the point.

State's Attorney, for State.

W. C. Dunton and Ormsbee & Briggs, for respondent.

TAFT, J. [Omitting other points.] The respondent excepted to that part of the charge relating to the evidence introduced to show his previous good character, and although in conclusion the learned judge says that the respondent has a right to have it considered with the other evidence upon the question of whether he is guilty, we think the whole charge would naturally mislead the jury as to the weight to be given such evidence, and the effect of it: for the court told them that the respondent had the right to put his good reputation before them for their consideration, "as a kind of make-weight in his favor, if there is a pinch in the case." Such expressions would naturally impress the jury with the belief that the evidence was of no value, except where the respondent was entitled to an acquittal without it; and such, we think, was the probable effect of the charge in this case. A respondent in all criminal cases is entitled to the privilege of putting his character in issue. If he offers evidence of his good character the prosecution can rebut it; and the jury have the right to give it such weight as they think it is entitled to.

In 1 Starkie on Ev. 75, it is said such evidence "ought never to have *any* weight except in a doubtful case." If this is law, all such evidence might as well be excluded; for if the case is doubtful, before its introduction (and that is the undoubted meaning of the quotation), the respondent is entitled to an acquittal without it: if the jury have a reasonable doubt of the prisoner's guilt, it is

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their duty to acquit; hence the evidence becomes unnecessary; and if Mr. Starkie is correct in his proposition, where the case is not doubtful upon the other evidence, it is not entitled to *any* weight, and so would be needlessly in the case. It is undoubted law in this State, that in criminal cases, the jury are judges of the law; but the instructions of the court are generally followed. And on this trial if they found there was no *pinch in the case* on the other evidence than that of character, the verdict of guilty naturally followed without reference to the evidence of character. Such evidence is not only useful in cases of doubt, but it is equally so, for the purpose of creating, generating, doubts. There are probably many cases where without it the jury should convict, but with it should acquit. As has been said by a learned court, Iowa, "A long and honorable life must be worth something to a man when accused of a crime in cases other than those where the evidence, independent of his good character, is doubtful or obscure"; and we think he is entitled to the benefit of it, and to have it considered by the jury, without its being shorn of effect, by their being told that it was only of use *in a pinch*. *State v. Northrop*, 48 Iowa, 583; s. c., 30 Am. Rep. 408; *People v. Garbutt*, 17 Mich. 9.

Exceptions sustained, verdict set aside, and cause remanded for a new trial.

Exceptions sustained.

EDDY V. ST. MARS.

(53 Vt. 462)

Adverse possession — boundary — pasturing on land left dry by receding pond.

One owned a pasture bounded by the edge of a mill pond of another. The pond gradually dried up by reason of the want of repair of the dam. The cattle turned into the pasture, followed the receding water and pastured on the dry bed. *Held*, that this afforded no foundation for a claim of adverse possession of the bed of the pond.*

TRESPASS on land. The opinion states the case. The plaintiff had judgment below.

*See *Trustees v. Kirk*, ante, 505.

J. G. Baker, for plaintiff.

W. G. Veazey and *J. B. Phelps*, for defendants.

BARRETT, J. The plaintiff must stand on his title, that on which he claims to be the owner of the land in dispute. His deed bounds him on the east contiguously to the land which Mrs. Lippitt claims that the deed to her husband conveyed to him, bounded on the west by the same line that bounds the plaintiff's land on the east, viz.: "then southerly on the edge of the pond to the northeast corner of John Eddy's land." That pond was in existence when the deeds defining said boundary were given. The deed to Lippitt gave him title to the pond, that is, to the line named. It gave him title to the land covered by the water, and to the edge of the pond as it then was. The going out of the dam and the sinking away of the water, as stated in the report, did not change the western boundary of what was covered by his deed, nor did it change the eastern boundary of plaintiff's land as described and conveyed by said deed to him.

This is not the case of a boundary by a stream, which may change by gradual washings and deposits. In this case the territory is limited by a defined boundary, without regard to the contingent subsidence of the water constituting the pond, and thereby leaving the land dry. The pond was an artificial creation as distinguished from the natural flow of a running stream. And not only the terms of the description, but the nature and reason of the case evinced the intent to fix a defined boundary of land, and give ownership to that boundary on both sides of it.

The plaintiff has not title by his deed. Has he by adverse possession? We think not. The water of the pond, while the pond was there, rendered needless any fencing on the part of either party. As the water receded, the defendant had no occasion to fence the land, having no use for it, and leaving the receded water to do its office. The plaintiff did nothing but what he had been doing while the water was in the pond, viz., putting his cattle into his pasture contiguous to the water. As the water receded the cattle followed. for drink, shade, and cropping what might be in their way.

There was nothing to indicate to the defendant that plaintiff was asserting, or acting upon, a claim of right as against her, in reference to the swale, bushes, wild grass, etc., which succeeded the re-

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tirement of the water. As before said, the plaintiff did nothing but turn his cattle into his own pasture, and they wandered at "their own sweet will" on to the bottom of the old pond, without any act, or word on his part. If he had fenced it in and put it to cultivation, or if he had given out that he was occupying it, claiming to be the owner, so as to charge the defendant with knowledge of his claim, if indeed his course in reference to it had been such as to indicate hostile claim in his use of the land, he would have some ground for his claim of title by adverse possession. Instead of that being so, his occupancy was indicative of his understanding that it was permissive; and every thing circumstantial indicates that the defendant regarded it in the same way, and he supposed she so regarded it.

Whether open occupancy operates notice to the other party that such occupancy is hostile, depends on the nature and circumstances of such occupancy. That subject is handled in the case of *Plimpton v. Converse*, 42 Vt. 712; *Same v. Same*, 44 id. 158, and what is held and said therein bears directly on the subject as it is involved in this case.

Mrs. Lippitt had no use for the land till she should want to cover it again with a pond, and had no occasion to give any attention to what was going on with it, by the plaintiff, or anybody else, and least of all would it indicate to her that the running of plaintiff's cattle on it that were feeding in his pasture was a warning to her that plaintiff was claiming to own the land, and not merely enjoying a tacit permission which he had by the fact that she did not fence him out when she had no use for the land and no occasion to do any thing in respect to it, or even to take notice in her summer visits of the going upon it of the plaintiff's cattle.

Judgment reversed and judgment for defendant.

Judgment accordingly.

CADENS V. TEASDALE.

(33 Vt. 460.)

Contract — substitution — novation.

A. owed B., and C. owed A. By agreement of the three, B. accepted C.'s note for A.'s debt. C. was *insolvent* at the time; but this was unknown to any of the parties. *Held*, that the loss fell on B.

ASSUMPSIT. The opinion states the case. The defendant had judgment below.

Redington & Butler, for plaintiff.

P. R. Kendall, for defendant.

TAFT, J. The plaintiffs, having a claim against the defendant, agreed if the defendant would procure one Oliver, a debtor of the defendant, to give the plaintiffs his (Oliver's) note on four months' time, that they would take it in payment of so much of the defendant's account. The agreement was accepted and the contract consummated. At the time all the parties believed that Oliver was solvent. He was in fact insolvent, failing before the maturity of the note, and nothing was realized by the plaintiffs upon it. The plaintiffs now seek to recover of the defendant the original account. The question presented is, upon whom was the risk of the insolvency of Oliver? In *Wainwright v. Webster*, 11 Vt. 576, the court say, that where the note of a third person is received in payment of a precedent debt, the risk of the insolvency of the maker is upon the party from whom the paper is received, unless there is an *express agreement* that the risk of the paper in this respect is to be the receiver's, or one is to be *implied from the facts and circumstances* of the case. In the case at bar, the defendant at the time of the transaction had simply an account, the collection of which he could enforce *in presenti*. Upon application to Oliver for money with which to pay the plaintiffs, it was arranged between the parties that Oliver should give his note to the plaintiffs, and they should accept it in lieu of their claim against the defendant. The note was given and the right to enforce the collection of the defendant's debt against Oliver was suspended for the life of the note. We regard the transaction as a substitution of the debt against Oliver, for the one against the defendant; and that it was the intention of the parties that the defendant should be discharged from his indebtedness, and from any claim on account of the insolvency of Oliver; from the facts and circumstances in the case, we think, such was the intention. The taking of a note, either of the debtor or of a third person, upon an open account, is *prima facie* payment of such account, upon the presumption that such is the intention of the parties at the time. The intention of the parties upon the question presented in this

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case should be held as equally decisive, as upon the question of payment. Finding that it was the intention of the parties, from all the facts and circumstances of the transaction, that the risk of Oliver's insolvency should be borne by the plaintiffs, the case is brought within the exception to the general rule as stated by BENNETT, J., in the case cited, and the result is, the judgment of the County Court is affirmed.

Judgment affirmed.

POWERS V. DOUGLASS.

(53 Vt. 471.)

Executor and administrator — liability on award.

An administrator entering into an agreement with the heirs for a common-law arbitration concerning the estate is personally liable on the award.*

ASSUMPSIT. The opinion states the case. The defendant had judgment below.

W. C. Dunton, for plaintiff.

W. H. Smith and Prout & Walker, for defendant.

ROYCE, J. This is an action of assumpsit on an award. Certain differences having arisen between the defendant, who was the administrator and one of the heirs of Sylvanus Douglass, and the plaintiff and others, also heirs, a submission of all such differences to the final arbitrament and award of the Hon. Hoyt H. Wheeler was drawn up in writing and signed by the defendant, the plaintiff and all the other heirs of the said Sylvanus Douglass, on the 8th of March, 1877. The arbitrator therein named made and published his award on the 29th day of May, 1877, awarding, among other things: "That Byron J. Douglass forthwith pay to Artemus C. Powers, out of the estate of Sylvanus Douglass in his hands as administrator thereof, \$170 with interest thereon, from the 15th day of March, 1873, to the time of payment." Upon this the declaration counts.

* See *Merchants' National Bank v. Weeks*, ante, 661.

By reference to the submission and award, it will appear that the differences submitted all relate to, and concern the estate of Sylvanus Douglass and the heirs to that estate. In the submission the defendant Byron J. Douglass appears solely in the character of administrator, except that his signature is without official designation; and the award deals with him in that capacity. This action is brought against Byron J. Douglass, personally; and it is claimed upon the part of the plaintiff that he is personally liable under the award. The general ground of defense is, that the submission and award merely affect the defendant in his capacity of administrator; and that the sum awarded to be paid by him stands substantially like a claim allowed by commissioners, and may not be recovered until after the Probate Court shall have decreed its payment.

Sections 39 and 40 of chapter 48, of the Gen. Stats., provide that disputed claims between an executor, administrator or guardian in his representative capacity and any other person, or between an executor or administrator and the estate which he represents, may be referred under an order of the Probate Court, in the manner therein prescribed; and that the award of the referee in such cases "made in writing, and returned to and accepted by the court, shall be final between the parties." Had the submission in this case been made under these sections of the statute, the claim of the defendant would be entitled to serious consideration; but it was evident that such was not the case. It was a common-law submission to arbitration, by parties legally competent to enter into it, of matters in dispute between them, without any relation to the Probate Court. It is true that the matters submitted had reference to an estate which was in process of settlement in the Probate Court; but this is a mere incidental fact. The legislature simply provided a method of referring to arbitration disputes arising in the settlement of estates, or their management by guardians which should bind the Probate Court and the parties; it did not make the form of procedure provided for exclusive.

Irrespective of any statutory enactment the parties to this submission had a perfect common-law right to do just what they did do; and in the absence of any language which can possibly be construed as indicating an intention on the part of the legislature to abrogate or affect that right, the statute will not be construed as affecting or superseding it. *Dickinson v. Dutcher*, Brayt. 104; *Chadbourn v. Chadbourn*, 9 Allen, 173.

Powers v. Douglass.

The submission not being made under the order of the Probate Court or under the statute, no action of that court upon the award is necessary, and the main question arises, is the defendant personally liable upon the award? No question is made but that the award is within the terms of the submission; and the court below found that the defendant had sufficient funds in his hands belonging to the estate out of which the award could have been paid. In 2 Redfield on Wills, 294, it is said: "It seems to be settled, that if the personal representative refer disputes between a creditor of the estate and the deceased, to arbitration, and in the submission stipulate generally to pay the amount of the award, he will be bound personally by the award. But if the award be only that the amount is due from the estate, and there be no order or finding that the personal representative shall pay the amount, he will not be liable unless he have assets, or only to that extent."

Both of the paragraphs above quoted apply to the case at bar. Such a submission by an administrator is in law regarded as a personal undertaking to pay the sum properly awarded under it. It is a contract by the administrator, not his intestate, and is subject to the same rules which govern executors' and administrators' contracts generally. The submission in the present case seems to answer the requirements of the law as to such contracts in all respects. It is in writing and is not only based upon the consideration of assets, but upon the further consideration of the undertaking of all the other heirs with the defendant, who was also an heir, to submit disputed matters to arbitration and abide the award. We think, according to the uniform course of the decisions in this State and elsewhere, that the administrator under such circumstances is personally liable upon the award. *Barry v. Rush*, 1 T. R. 691; *Worthington v. Barlow*, 7 id. 453; 2 Rose Bankr. Cas., 50; *Willard v. Brewster*, Brayt. 104; *Moar v. Wright*, 1 Vt. 57; *Lovell v. Field*, 5 id. 218. Administrators are held personally liable for costs, *O'Hear v. Skeels*, 22 Vt. 152; and upon personal contracts made by them, though wholly relating to the estate, may sue in their individual capacity. *Bottam v. Morton*, Brayt. 108; *Flowers v. Kent*, id. 134; *Trask v. Donoghue*, 1 Aik. 370; *Perrin v. Granger*, 33 Vt. 106; *Adams v. Campbell*, 4 id. 447; *Manwell v. Briggs*, 17 id. 176; *Shaw, Admr., v. Hallihan*, 46 id. 394; *Riz v. Nevins*, 26 id. 384; *Aiken v. Bridgman*, 37 id. 249; *Haskell v. Bowen*, 44 id. 579. We can see no reason why the same rule

Pollock v. Sullivan.

should not apply in the case of actions brought against administrators personally ; and such seems to be the uniform current of the decisions.

The judgment of the County Court is reversed and judgment for the plaintiff for the amount awarded him by the arbitrator.

Judgment accordingly.

POLLOCK V. SULLIVAN.

(53 Vt. 507.)

Fraud — promise of marriage by a married man.

An unmarried woman may maintain an action of fraud against a married man for promising to marry her.

ACTION on the case. The opinion states the case. The defendant had judgment below.

Farrington & Post and Willson & Hall, for plaintiff.

George W. Newton, George A. Ballard and Noble & Smith, for defendant.

REDFIELD, J. The declaration counts tort-wise, for fraud and deceit, whereby the plaintiff has suffered injury. It avers in substance that the defendant, professing to be an unmarried man, paid his addresses to the plaintiff and offered himself in marriage to her, and that she believing his pretensions and representations to be true, accepted his proffer, and agreed to marry him ; and that in fact defendant at that time was living with his wife and children at St. Albans ; and thereby she was defrauded and injured. To this declaration the defendant files a general and special demurrer.

We have not carefully examined the several counts, to find whether some of them may not be technically defective under *special* demurrer, but we think some of them may withstand that assault. The plaintiff avers fraud and damages thereby occasioned. Fraud occasioning damage and injury is actionable ; otherwise persons may suffer injury by the wrongful acts of others, and the law afford no redress. This would bring the laws of the land into contempt. The demurrer confesses the truth of the facts alleged in

Newell v. Whitcher.

the declaration. And we think the facts averred being true are actionable. The facts alleged show that the plaintiff is wanting in discretion, if not in some of the more cardinal virtues ; but that is all for the jury, and outside the law of the case. On demurrer to her averments and complaints, she is to be regarded as an innocent person deceived and defrauded.

The defense claims that the act should have been *assumpsit* for the breach of the contract. The adjudged cases seem to establish that the innocent party in such case may sustain an action for a breach of the promise of marriage ; that the other party will not be permitted to allege that he cannot perform *his contract* because he had a wife when he agreed to marry another. If such action was brought and the defendant should be foolhardy enough to offer to perform his contract, the plaintiff must desist, or subject herself to a criminal prosecution. The essential wrong to the plaintiff is, not that she had not attained a husband, as she expected ; but that she spent her time and money in arrangements and preparation for marriage with the defendant when in fact he had then and now a wife, and was deluded into this relation by the fraud and falsehood of the defendant, and by such deception and fraud she has suffered grievously in property and reputation. This action is appropriate to redress the species of wrong. Whether the plaintiff has a character that can be impaired or lost, can be ascertained in the proper forum, before a jury. *Howard v. Gould*, 28 Vt. 523 ; 1 Hil. on Torts, p. 3, note a ; Sedg. on Dam., p. 48, and cases there cited ; Chit. on Cont. (10th Am. ed.) 750.

The result is, the judgment of the County Court is reversed, and the demurrer overruled. The defendant at the hearing asked leave to replead, in case the judgment should be against him ; the leave will be granted on the usual terms, and the case is remanded.

Judgment accordingly.

NEWELL V. WHITCHER.

(53 Vt. 589.)

Trespass on guest's room — assault — damages.

The plaintiff, a blind girl, taught music in the defendant's family one day every week, and passed the night in his house, lodging in a room assigned her by the defendant and his wife. One night at midnight the defendant

came stealthily into the room, sat upon her bed, leaned over her and solicited her to sexual intercourse, which she refused. *Held*, a trespass and an assault; that exemplary damages are proper; and that the question whether these acts would have injured a person of ordinary nerve and courage was immaterial.

ACTION of trespass. The opinion states the case. The plaintiff had judgment below.

Belden & Ide, for plaintiff.

Henry C. Bates, Harry Blodgett and E. May, for defendant.

REDFIELD, J. The plaintiff, an unfortunate girl, blind from her birth, gave lessons in music one day in each week to defendant's daughters, and lodged there over night. A certain room in defendant's house was assigned to plaintiff by defendant and his wife, as a private lodging room. On the occasion in question, she was awakened about the middle of the night, in the dark, by the rustle and footsteps of some person in her room; presently the defendant sat down upon her bed and bedclothes in which she was wrapped, leaned over her person, and made repeated and persistent solicitations to her for sexual intimacy, which she repelled, and urged him to leave her room. She got up from her bed, dressed herself and sat up the residue of the night. And by these acts of the defendant she was so excited, alarmed and put in fear, and her feelings so outraged that she was made sick, and so continued for a long space of time. The declaration is in three counts. Trespass, *quare clausum*, and a count in case.

I. It is claimed that the entry into the plaintiff's private apartments did not support the action of trespass *quare clausum*; but we think that her right to her private sleeping-room during the night under the circumstances of this case, was as ample and exclusive against the inmates of the house, as if the entry had been made into her private dwelling-house through the outer door. Her right of quiet occupancy and privacy was absolute and exclusive; and the entry by stealth in the night into such apartments, without license or justifiable cause, was a trespass; and if with felonious intent, was a crime. *State v. Clark*, 42 Vt. 630.

II. The approach to her person in the manner her testimony tends to prove — sitting on the bed and bed-clothes that covered her person, and leaning over her with the proffer of criminal sexual intercourse ; so near as to excite the fear and apprehension of force in the execution of his felonious purpose, was an *assault*. The whole act and motive was unlawful, sinister and wicked. The act of stealing stealthily into the bed-room of a virtuous woman at midnight to seek gratification of criminal lust, is sufficiently dishonorable and base in purpose and in act ; but especially so, when the intended victim is a poor, blind girl under the protecting care of the very man who would violate every injunction of hospitality, that he might dishonor and ruin at his own hearthstone this unfortunate child, who had the right to appeal to *him* to defend her from such outrage. *Alexander v. Blodgett*, 44 Vt. 476.

III. The court charged the jury that if the plaintiff was so frightened and shocked in her feelings as to injure her health by defendant's conduct as described in her testimony, she could receive damages for such injury. The defendant's counsel asked the court to charge, in substance, that if defendant's acts and conduct would not have injured a person of ordinary nerve and courage, then there be no recovery.

When the acts of the party complained of are of themselves innocent and harmless, and may become wrongful by the manner in which they are done, then a man is to be judged by the common and ordinary effect of such acts. But when a married man breaks into the bed-room of a chaste and honest woman at midnight, and proposes to her sexual and criminal commerce with her, the act is wholly wrongful ; the aim and purpose is wrongful and the act if perpetrated is criminal ; and the party offending must answer in damages for all actual injuries. And we think in this case, if all the facts claimed by the plaintiff in her testimony were found to be true, the plaintiff had a right to recover. And the charge of the court as to exemplary damages was sound.

The judgment of the County Court is affirmed.

Judgment affirmed.

GILCHRIST V. HILLIARD.

(53 Vt. 592.)

Sale — accounts — implied warranty.

On the sale of accounts there is an implied warranty that they are genuine and owing.

ACTION for false warranty on sale of accounts. The opinion states the point. The defendant had judgment below.

W. E. Smith, for plaintiff.

Leslie & Rogers and *L. P. Poland*, for defendant.

ROYCE, J. The accounts that the defendant sold and assigned to the plaintiff were, for all but \$15, worthless at the time of the sale; not on account of the insolvency of the parties that they were represented to be against, but for the reason that the defendant had no valid accounts against the persons whose names appeared as his debtors upon the list of accounts assigned.

In Long on Sales, 204, it is said that there is an implied warranty in every sale that the thing sold is that for which it was sold, or answers substantially to that description or representation. In *Bank of St. Albans v. Farmers & Mechanics' Bank*, 10 Vt. 145, the court say, that "it seems now well settled that a person giving a security in payment, or procuring it to be discounted, vouches for its genuineness." In *Thrall v. Newell*, 19 Vt. 202, which was an action upon an alleged warranty that a note which had been transferred to the plaintiff was a good and valid note, and alleging that one of the makers had recovered a judgment in a suit upon the note, upon the ground of his insanity at the time he signed it, although an express warranty was found, and a recovery had upon that ground, the court strongly intimate that a recovery might have been had on the implied warranty. They say, that if one or both of the signatures to the note disposed of by the defendant had been forgeries, there would seem to be no question but that the defendant would be liable on an implied warranty. If the law would imply a warranty in such a case

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why would not the same implication be made upon the sale of a fictitious chose in action? Here the accounts sold had no existence. The contingency upon which they were to become valid never happened, and the defendant was bound to make them what they appeared to be,—accounts, due and owing. He was not relieved from liability to that extent by any thing that appears to have transpired between the parties and Gleason. If the liability of the defendant were dependent upon the question of fraud in the sale, it might merit a different consideration. Upon the cases as presented, the defendant is liable upon an implied warranty.

The damages not having been certainly assessed in the County Court, so that a final judgment can be rendered, the judgment is reversed and cause remanded.

Judgment reversed.

EVARTS V. MIDDLEBURY.

(53 Vt. 626.)

Evidence — expert — as to horse shoes.

In an action against a town for injury to a horse by a defect in a highway in the winter, the defense was that the horse was improperly shod. The shoes were exhibited to the jury, and a witness, a blacksmith, was allowed to give his opinion that they were put on for summer use and were too dull for winter use. *Held*, no error.

ACTION of damages for injury to a horse. The opinion and head-note show the facts.

C. F. Kingsley, for plaintiff.

J. F. Slade, for defendant.

BARRETT, J. In this case the court does not find occasion or need to review the cases involving questions as to expert testimony, either for the purpose of defining such testimony, or of stating the rules to which it is subjected in application.

To the extent to which the witness testified as an expert, as the court understand and construe the exceptions, objection seems hardly to be made in the argument. Plaintiff's counsel seems to

regard the exceptions as presenting the witness, testifying as an expert, "whether the horse was too smoothly shod to properly manage a load of lumber on a mountain road." The court regard the witness to have testified in his character of a blacksmith "accustomed to shoeing of horses," only on the question whether the shoes as presented had been prepared for summer or winter use. It is agreed that the shoes were properly exhibited in evidence. It was assumed on the trial and not questioned in this court, that a different caulking of shoes is practiced for summer from that for winter use. This was familiar to the witness in his business as a blacksmith. He expressed the opinion that the caulks were put on for summer and not for winter use. The *bite* of the objection is in what follows, "that they were too dull altogether for winter use." It is not shown that he was asked his opinion of the fitness of the shoes at the time and place of the accident, or that he expressed any opinion on that subject. We understand that last clause of the testimony to have been uttered by the witness by way of description, as showing the difference between summer and winter shoes. As bearing on the question of want of requisite care on the part of the plaintiff, it was proper to show whether or not he had made any preparation for such use of the horses as he put them to at the time of the accident. There were the shoes, showing for themselves. Whether plaintiff was chargeable with want of care in that respect might be affected by what had foregone on his part. The season having passed into winter, and the surface having changed accordingly, it would be natural and sensible to inquire whether the shoes had been changed to accord with the changed surface; and if it should be found that they had not, that fact would be for consideration in connection with the exhibited shoes in passing on the subject of requisite care. If it had appeared that they had been prepared for winter use, the fact of the dullness, or any insufficiency of the caulks at the time of the accident, might have a very different consideration as bearing on that subject from what it would be entitled to if they had not been so prepared.

The naked fact of the dullness of the caulks would not, under the circumstances, be conclusive on that subject. The circumstances attending such dullness might be necessary in order to have it appear whether that dullness was the result of negligence in that respect, or had come to pass without such negligence. The care required in this class of cases is such as prudent men are accustomed

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to exercise under like circumstances. In order to judge on that point, something more than the mere fact of dullness might be important. How did that condition of the shoes happen to exist at that time? would be foremost to be asked by most men charged with the duty of determining, whether it was in the exercise of the care which characterizes prudent men. It is not our province to evoke error in the trial by *curious criticism* or *conjectural construction*. So it is repeated that as this court understand the exceptions, the evidence given by the witness does not fall within the category to which the objection taken and urged is applicable, viz., the enacting by the witness what it is the sole province of the jury to do.

Judgment affirmed.

SPAULDING V. WAKEFIELD'S ESTATE.

(53 Vt. 660.)

Executor and administrator — negligence.

In payment of three legacies of \$1,000 each, an executor delivered three \$1,000 United States interest bearing bonds worth everywhere \$1,200, each. Held, negligence for which he was liable, although the bonds had been appraised at \$1,000 each, and the executor was informed by the Probate Court that he could pay them out at the appraisal valuation.

THE head-note and opinion show the facts. The estate had judgment below.

R. W. Clark and Haskins & Goodwin, for plaintiff.

A. Stoddard and Davenport & Eddy, for defendant.

Ross, J. It is well settled that the measure of care and diligence which an executor or administrator is bound to bring to the management and closing of the estate, is that which a prudent man would exercise under like circumstances. However much of good faith and honest intention he may exercise in the discharge of his trust duties, unless he also exercises this degree of care and diligence, and the estate suffers from the lack of it, he is bound to make the loss good to the estate. Measured by this standard, we think, the deliv-

ery of a \$1,000 U. S. 5-20 bond, worth at the time in all the markets of the country \$1,200, to each of the three legatees in payment of a legacy to each of \$1,000 was negligence, and rendered the plaintiff liable to account for the loss to the estate. We cannot yield to the claim of the plaintiff's counsel, that his duty was discharged when he obtained the value placed upon the bonds by the appraisers, or the amount which the government promised to pay the holder. The very fact which he urges, to wit: that such obligations were fluctuating in the market, bound him to keep informed in regard to their market value, and to use the diligence of a prudent man to take advantage of the market, and realize the most possible for the estate. Nor does what the Probate Court told the plaintiff at all lessen the measure of care and diligence he was bound to exercise in the discharge of his duties. He was bound to know the law, and if he had doubts about his knowledge, or ability, to obtain accurate knowledge of the degree of care and diligence which he was bound to exercise, he should have declined the trust. What the Probate Court told him would have an important bearing upon his good faith in the transaction, if that were the only element entering into the determination of his liability. As these bonds were interest-bearing securities, the plaintiff was properly charged with interest on the amount of the over-payment of the legacies. Besides, it would have been his duty to have exercised this same degree of care and diligence to have kept the overplus at interest. His act, which occasioned the loss, put it out of his power to exercise this degree of care and diligence in placing the overplus at interest.

[Omitting a minor point.]

The judgment of the County Court is affirmed.

ROBERTS V. ROBERTSON.

(53 Vt. 600.)

Deed — exception — reservation.

A deed contained a specific description of land conveyed, and contained this clause: "Said J. C. Roberts reserving lots sold, Nos. 1, 2, 3. . . 32, 33." The two last had not been sold. *Held*, that they did not pass, the clause being an exception.

Roberts v. Robertson.

TRESPASS *quare clausum fregit*. The opinion states the point. The defendant had judgment below.

C. B. & C. F. Eddy, for plaintiff.

Kittredge Haskins, for defendant.

POWERS, J. The plaintiff executed to the defendant and others, on the 5th of February, 1870, a deed of certain land, adjoining the cemetery in Putney, with full covenants.

The deed contains a specific description of the land conveyed, and contains also this clause: "Said J. C. Roberts reserving lots sold, Nos. 1, 2, 3...32, 33," — in all 29 lots, designated by number like the foregoing. The plaintiff now claims title to lots 32 and 33 under the clause above quoted. The defendant claims that the plaintiff excepted from his deed such lots only as he had in fact sold, and that lots 32 and 33, having in fact never been sold, passed to the grantees in said deed. The word "*reserving*," used in the deed in strict sense means *excepting*.

The office of an *exception* in a deed is to take something out of the thing granted that would otherwise pass, while a *reservation* creates in favor of the grantor some *new right* out of the thing granted which was not before *in esse*. The terms however as used in deeds, are often treated as synonymous; and words creating an exception are to have effect as such, although the word reservation is employed. In this case the grantor undertook to withdraw from his grant certain lots; and his language is to be construed as an exception. The same rules of construction apply to an exception in a deed as govern the grant itself. Indeed, the books treat of an exception upon the theory that it is a regrant by the grantee to the grantor of the estate described in the exception.

It is a fundamental rule that deeds shall be construed in a way to effectuate the intent of the parties. If upon the whole instrument the estate intended to be conveyed can be ascertained with convenient certainty, a further inconsistent or untrue description of it will be disregarded. *Falsa demonstratio non nocet*. Many illustrations of this rule are found in the reported cases. Thus, a deed of all A.'s interest in lot No. 7, which was conveyed to A. by B., when in fact A.'s title came from C. instead of B., was held to convey A.'s interest in lot 7. *Hathaway v. Juneau*, 15 Wis. 264. The

evident intent of the deed was to convey A.'s interest in lot No. 7. The origin of A.'s title was mere matter of description of the interest intended to be conveyed and hence was disregarded. In *Smith v. Strong*, 14 Pick. 128, the deed described certain pieces of land by numbers "*in the Boston purchase*," among which were the lots in question, Nos. 15 and 43. These lots in fact were not in the "Boston purchase," but north of it; nevertheless they were held to have passed, on the ground that the specific designation of the lots by number controlled the general description as to their location. In *Doe v. Rouse*, 5 C. B. 422, the testator devised certain property to his '*dear wife Caroline*.' His lawful wife Mary was living at his death; but he had gone through the ceremony of marriage with another woman named Caroline, who was living with him at his decease. The words '*dear wife*' were false as applied to Caroline, and were in strictness only applicable to Mary. The court held that Caroline took the estate devised, as she was specially named as devisee; and the words '*dear wife*' would be treated as false demonstration.

In all cases the inquiry is: Is there a grant of a specific thing? if so, the addition of an untrue circumstance attending it shall not defeat the grant. The description, so far as it is false, is treated as applicable to no subject at all; so far as it is true, as applicable to one subject only. *Morrell v. Fisher*, 4 Exch. 604; *Webber v. Stanley*, 16 C. B. (N. S.) 755.

Here lots 32 and 33 are described as lots *sold*. If the grantor had said, "I except all the lots heretofore sold," and had added nothing more by way of description, the reasoning of the defendant would be sound. The exception then would cover only such lots as had in fact been sold. But the plaintiff specially enumerates the lots excepted from his grant, and describes them by number, the only practicable way in which such lots can be described. The false circumstance that they were sold, added to the certain description given, must be disregarded.

Judgment reversed, and judgment for plaintiff for three dollars damages and costs.

Judgment reversed.

 In re Healey.

IN RE HEALEY.

. (53 Vt. 694.)

Witness — immunity from process — contempt.

A., a resident of New York, had pending in a Vermont County Court a suit in the name of another person against B., and came into Vermont for the sole purpose of testifying in said suit, and was a material witness, and as such and as party plaintiff in interest was in attendance at the trial. Within twenty minutes after A. left the court room, B. caused a summons to be served on him in a suit in B.'s favor against A., returnable before a Vermont justice of the peace, for substantially the same claim B. had pleaded in defense to the suit against him by A. *Held*, that B. was guilty of contempt of court, and an order was made committing him, unless he discontinued said suit brought by him. (*See note, p. 717.*)

THE opinion states the case.

E. J. Ormsbee and A. F. Walker, for petitioner.

J. J. Wilson, for petitionee.

VEAZEY, J. William W. Healey, of Danville, N. Y., a man of financial responsibility and good standing, became by purchase the owner of two promissory notes—one against the defendant Howe, and another against another party, both residents of Vermont. These notes not being paid when due, Healey sent them to the petitioner, Ormsbee, an attorney, for collection; and he brought suit on them in his own name, but for the benefit of Healey; and these suits were pending and came on for trial in this court at the September Term, 1880. Healey was a material witness in said suits, and was in attendance at the said trial as a witness, and as the party plaintiff in interest, though not in name; and testified as such witness, and was in the State for no other purpose. The trial of said cause was had on the forenoon of the 12th day of October; and within twenty minutes after said Healey left the court-room after so testifying, and within a few rods of it, and while on his way to his hotel, and before a decision had been rendered, and before the leaving of any train by which said Healey could have returned to his home in the State of New York, the

defendant Howe, through his attorney, caused process of summons to be served on Healey in a suit in favor of the defendant against Healey, returnable before a justice of the peace in Sharon, Windsor county, on the 1st day of November, 1880, demanding \$200 damages for an alleged conspiracy, the same as alleged in the defendant's plea in said cause in this court. Whereupon this petition was brought charging the facts, and motion was made that this court take notice of the same as of a contempt of this court.

It has long been a well-settled rule of law that all persons who have any relation to a cause which calls for their attendance in court, and who attend in the course of that cause, though not compelled by process, are for the sake of public justice protected from arrest in coming to, attending upon, and returning from the court. Tidd Pr. 196; 1 Greenl. Ev., §§ 316, 317, 318, and cases cited. This protection is granted for the sake of public justice.

The question has often been raised whether the remedy would be the absolute setting aside of the process in case of arrest, or in other words, whether the immunity extends to process of summons. In case of a resident suitor or witness, the authorities differ. In the case of a non-resident suitor or witness, the weight of authority is to the effect that the immunity is absolute from the service of any process, unless the case is exceptional. *Person v. Grier*, 66 N. Y. 124; s. c., 23 Am. Rep. 35; *Norris v. Beach*, 2 Johns. 294; *Sanford v. Chase*, 3 Cow. 381; *Hopkins v. Coburn*, 1 Wend. 292; *Seaver v. Robinson*, 3 Duer, 622; *Merrill v. George*, 23 How. Pr. 331; *Van Lieuw v. Johnson*, not reported, but referred to in *Person v. Grier*, *supra*; *Bridges v. Sheldon*, 7 Fed. Rep. 36; *Halsey v. Stewart*, 1 Southy, 366; *Miles v. McCullough*, 1 Binn. 77. In *Hall's* case, 1 Tyler, 274, the court say that a writ of protection which neither establishes nor enlarges the privilege, but merely sets it forth and commands due respect to it, suspends all civil process. In the above causes and others the proposition is announced in various forms, but in substance, that this immunity is one of the necessities of the administration of justice. The language of WHEELER, J., in *Bridges v. Sheldon*, *supra*, is: "A party who could not attend to his suit without being liable to such service would be under personal restraint from which those engaged in the administration of justice have a right to be free." In *Person v. Grier*, ALLEN, J., says: "Courts would often be embarrassed if suitors or witnesses, while attending court, could be molested with process. Witnesses might

In re Healey.

be deterred and parties prevented from attending ; and delays might ensue and injustice be done." In *Sanford v. Chase*, the court say : "The privilege of a witness should be absolute."

The provision of our statute is : "Any party or witness * * * shall not be liable to be arrested or imprisoned or detained * * *." Has this limited the power of the court to interfere ? It seems to me not. As stated by WHEELER, J., in *Bridges v. Sheldon, supra*, and in other cases "this privilege arises out of the authority and dignity of the court where the cause is pending, and protection against the violation of the privilege is to be enforced by that court and will be respected by others." *Hurst's case*, 4 Dall. 387. He also says : "The proceeding rests upon the idea that what was done was a contempt which the court should punish." In *Thinder v. Williams*, 4 T. R. 377, it is said that the discharge of the party privileged is founded on the contempt of the court by arresting him while giving his necessary attendance upon it. It is deemed as a contempt to serve process upon a witness, even by summons, if it is done in the immediate or constructive presence of the court upon which he is attending. 1 Greenl. Ev., § 316 ; *Cole v. Hawkins*, Andrews, 275 ; *Blight v. Fisher*, 1 Pet. C. C. 41 ; *Miles v. McCullough, supra* ; see also, *Montagu v. Harrison*, 91 Eng. Com. Law (3 C. B. N. S.), 291.

The act of Howe would have been a plain disobedience of the order of this court if it had caused a subpoena to be served upon Healey and had given him a writ of protection. The case stands, as before shown by the authorities cited, precisely the same without such subpoena and writ. The protection does not depend upon the writ. It grows out of the privilege which the law has established. It constitutes a continuing order. Moreover it has been held that punishment of a party for contempt is sometimes a remedial process to which the opposite party is entitled, though it may not be necessary for the vindication of the authority of the court. *Howard v. Durand*, 36 Ga. 346.

Our statute was enacted before imprisonment for debt was abolished, and when service by arrest was common. It was not intended to restrict the rights of courts to punish for contempt or properly protect the administration of justice. In the exercise of the power vested in courts to punish for contempt, they should proceed with great caution, and especially in a case of this kind, with a view to promote, not defeat justice.

Under the law as established in New York, the State of the residence of Healey, a resident of Vermont being in that State under the circumstances that Healey was here, would be absolutely protected. *Person v. Grier, supra*. While the parties were trying in this court the very issues that would be involved in the justice suit, and when Healey was here for the sole purpose of testifying in this court, Howe seized upon the opportunity to entangle him in further litigation upon the same question before another court in a distant part of the State. It is difficult to see how this would promote justice or to see any other purpose than to harass and annoy Healey. It does not appear that Howe has not had his day in court fairly, or that he has not had all the benefit which the law can give him, or even that he could reasonably expect a different result before another just court. Upheld, his proceeding would tend to deter witnesses from coming here from another State to testify. Its tendency generally would be to obstruct the administration of justice. Healey had a right to be here unmolested by such process not on his own account, but because the privilege is established in law in order that courts may not be obstructed in the administration of justice. As stated in some of the earlier cases, the privilege of the witness was not considered the privilege of the person attending, but of the court which he attends. *Cameron v. Lightfoot*, 2 W. Bl. 1190. Healey's presence was deemed essential, and so far as appears was essential to a just determination of the cause. No proper motive seems to have inspired Howe's act, but the reverse. The authorities cited above and other cases establish that the service upon Healey was, under the circumstances, an act in contempt of this court. Whether regarded as an act in violation of the order of the court, or as an act interfering with the administration of the court, it was not essential in order to be a contempt that it be done in the immediate presence of the court. See authorities *supra*; also *Childerson v. Barrett*, 11 East, 439; 2 Bl. 1, 113; *Gibb's case*, K. B. 308; *Davis v. Sherron*, 1 Cr. C. C. 287; *Cole v. Hawkins*, Str. 1094; 2 Bish. Cr. L., § 252.

If the writ had been made returnable to this court, where the former motion was pending, it would have been dismissed on motion. The court would not have taken jurisdiction of a party whose rights were thus invaded. It would be in effect a withdrawal of the shield and protection which the law uniformly gives to witnesses. As the court cannot exercise authority directly over the

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justice case, it ought to apply the only remedy left, which is to punish Howe for his contempt.

It is therefore adjudged, that unless the defendant Howe discontinues said justice suit at the next term of Windsor County Court, to which it has been appealed, he pay a fine of \$30 to the clerk for the State of Vermont, and he be committed until said order be complied with and said suit discontinued.

Order affirmed.

NOTE BY THE REPORTER.—This topic has been recently considered in New Jersey. In *Dungan v. Müller*, 8 Vroom. 182. It was held by the Supreme Court, that a party to a suit in chancery, who resides in another State and comes into this State to give testimony in his own behalf before a master in chancery, is, while necessarily attending before the master and going to and returning from the place where such examination is held, privileged from the service of a summons in a civil cause, without any subpoena *ad testificandum* being served. The court said: "A party to a suit while necessarily going to, staying at, or returning from court, is privileged from the service of a summons or capias in a civil cause. *Halsey v. Stewart*, 1 South. 306. The place at which the party attends is not material. The privilege extends to attendance before any tribunal or officer before whom proceedings necessary in the trial or hearing of the cause are had, as before an arbitrator appointed by rule of court, a master of chancery or on the execution of a writ of inquiry. 2 Taylor on Ev., § 1202.

"It was insisted that the examination of witnesses on the part of the defendants having been closed, except as to the examination of this defendant, and no other proceedings being had before the master on that day, the privilege of the defendant was not that of a party, but merely as a witness, and that therefore process of subpoena was necessary for his protection.

"In *Rogers v. Bullock*, 3 N. J. L. 516, it was held on the language of the statute, that subpoena served was necessary to secure the privilege of a witness from arrest during his attendance in court. Elsewhere, it has been decided, and I think on better reason, that on a voluntary attendance in good faith, by a witness without subpoena, the witness is privileged. *Walpole v. Alexander*, 3 Doug. 45; 1 Green. on Ev., § 36. Especially so where the witness resides in another State and is under no legal compulsion to obey the process of courts in this State.

"It would be an idle ceremony for a party to sue out process of subpoena for himself to give testimony in his own behalf. His attendance for that purpose is an attendance as a party in a proceeding connected with the trial of the cause, and as such, he is exempt from service of summons."

Precisely the same was held by the vice-chancellor in *Jones v. Enawes*, 4 Stew. (31 N. J. Eq.) 211. The court said: "The Supreme Court, in 1809, decided that according to the rule prescribed by our statute (Rev. p. 380, § 15), a witness was not entitled to immunity from arrest while attending court, unless his attendance was in obedience to process of subpoena. *Rogers v. Bullock*, 3 N. J. L. 517. The witness who claimed immunity in that case was, undoubtedly, I think, a citizen of this State, and as such, amenable to the process of our courts. If the fact had been otherwise, it was quite too important to have escaped mention by the learned reporter, who was a member of the court which decided the case. I think it may therefore well be doubted whether in a case like the present, where the witness is not bound to obey the process of the courts of this State, and whose attendance cannot be compelled by compulsory means, and if procured at all, must be voluntary, it would be held that attendance in obedience to process is necessary to immunity. An absurd purpose should not be imputed to the legislature. They certainly did not intend to deprive the suitors of this State of the testimony of witnesses residing in foreign jurisdictions; nor can it be supposed that they intended to send the writs of our courts into jurisdictions where they would be entitled to no more force than

so much blank paper. In my view, it is much more reasonable to conclude they simply meant that process should be used within our own jurisdiction, where it is entitled to command respect and obedience. Much the same view has already been expressed by Mr. Justice DEPRE, in *Dungan v. Miller*, 8 Vr. 182.

"But this case presents a much more important question than a question of privilege to the witness. Was not the arrest an invasion of the prerogative of this court? It is the undoubted right of every tribunal intrusted with the determination of questions of fact, to compel the attendance of witnesses, and to hold and control them until the purposes of their attendance are fully accomplished. This power is absolutely indispensable to the discharge of their functions. The witness in this case had not been discharged, and although his examination had been completed, his further attendance had not been dispensed with. His further examination might have become necessary for the correction of his testimony, or to supply an omission arising from the inadvertence of counsel. Until discharged by the court he was subject to its order, and his arrest withdrew him from the power of the court at a time when it had a right to his presence, and while his actual attendance before the court might have been necessary for the due administration of justice. The fact that the court was not actually in session, when the arrest was made, is quite immaterial; the decisive fact is the witness was arrested while he was in attendance before the court, and while he was subject to its power and entitled to its protection. In the interim between the adjournment from one day until the next, the court does not lose its power over those who have attended before it as witnesses and have not been discharged; nor does an adjournment so far withdraw the protection of the court, that in the interval an unscrupulous suitor may punish them by arrest, for giving evidence against him, or prevent them by the same means from giving evidence which he fears may prejudice him. If such obstruction to the course of justice were tolerated, because the court was impotent to remove them, its administration would soon be impossible.

"Unless the courts can give immunity from arrest to those who appear before them to testify, and free them, at least while assisting in the administration of justice, from everything like terror and intimidation, their power is not adequate to the full discharge of the duties with which they are charged. This prerogative was said by Judge KARR to be founded in the necessities of judicial administration, and he held even the service of a summons on a person, who had attended before him, as an invasion of it, and set the writ aside. His judgment was approved by Chief Justice TANEY and Justice GRIZZ. *Parker v. Hutchins*, 1 Wall. Jr. 239. Many cases might be cited in support of the power. I refer to those only which are almost precisely analogous. *Norris v. Beach*, 2 Johns. 294; *Dixon v. Ely*, 4 Edw. Ch. 557; *Scarce v. Robinson*, 3 Duer, 622.

"The petitioner was examined under an order opening the testimony in this case, and giving the defendant leave to examine the petitioner and one other witness, for the purpose of proving certain newly-discovered facts. The order directed the witnesses to be examined in open court. The nature of the evidence proposed to be offered rendered it highly important that its production should be controlled by the court. Had the petitioner been aware that he was liable to arrest, and for that reason had refused to come here without an order giving him safe conduct, there can be no doubt it would have been granted. The power and duty of the court in this respect, I think, are clear. It is true, such protection was neither solicited nor extended in advance of his coming; but will it be consistent with the dignity and justice which should always characterize judicial conduct, to refuse to give him now, because we have his testimony, the protection we would have extended to him to get his testimony if it had been asked for in advance? I am very decidedly of opinion it will not.

"The question presented by this motion was one of such great practical importance, in view of the *nisi prius* character of hearings before the vice-chancellor, that I thought it ought not to be decided without consultation with the chancellor, and I accordingly laid it before him. I am gratified to be able to state that he fully concurs in the opinion that the arrest of the petitioner was unlawful, and that he must therefore be discharged."

To *Jones v. Knutson*, Mr. Stewart, the reporter, appends a note from which we make the following extracts:

"That a party to a suit or a witness is privileged from arrest while in attendance thereon and going and returning, see cases cited in 1 Chit. Arch. Q. B. 730; 1 Tidd's Pr. 195; 1 Greenl. on Ev., §§ 316-318; 1 Whart. on Ev., § 389; 2 Phil. on Ev. (4th Am. ed.) 291.

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Besides these the following instances, where such privilege was recognized, may be noticed. Where the arrest was made at a subsequent term to which plaintiff's cause had been continued, *Com. v. Huggford*, 9 Pick. 257; *Smythe v. Banks*, 4 Dall. 329; while a defendant was returning from an appearance to a *habeas corpus* issued from a Federal court, and another *habeas corpus*, issued from a State court, was served on her (*Evert's case*, 3 Disn. 33; see *Rex v. Deleval*, 3 Burr. 1434; *Rex v. Blake*, 2 Nev. & M. 312); a service of a subpoena to answer a bill in chancery on a witness attending another cause *Martin v. Ramsey*, 7 Humph. 230; after one arrest and bail given thereto *Clarke v. Simpson*, 1 McMull. 286; although the second arrest was in another county, *Sadler v. Ray*, 5 Rich. 523; while attending a reference before a master in vacation, *Vincent v. Watson*, 1 Rich. 194; *Huddeston v. Prizer*, 9 Phila. 65; while attending from another State, to hear an argument in his own case in the Court of Appeals, *Pell's case*, 1 Rich. 197; while attending a suit in the Common Pleas, *Harris v. Grantham*, Coxe, 142; after an insolvent discharge, and while returning from a session of the court, under a notice from the plaintiff, *Richards v. Goodson*, 2 Va. Cas. 381; while defendant was returning home from attendance on a suit, *Hammerskold v. Rose*, 7 Jones 625; or coming voluntarily to attend it, *Solomon v. Underhill*, 1 Camp. 229; or coming to court under a subpoena, *Dickenson's case*, 3 Harring. 517; or voluntarily attending from another State, *Ballinger v. Elliott*, 72 N. C. 596; *May v. Stumway*, 16 Gray, 83; *Thompson's case*, 122 Mass. 428; *Person v. Pardee*, 6 Hun. 477, 66 N. Y. 124; *Juneau Bank v. McSpedan*, 5 Biss. C4; *Brett v. Brown*, 13 Abb. Pr. N. S. 255; even where both parties were non-residents, *Henegar v. Spangler*, 29 Ga. 217; attending a police court as a prosecutor, *Montague v. Harriman*, 3 C. B. (N. S.) 282; or the execution of a writ of inquiry, *Walters v. Rex*, 4 Moore, 31; after a plaintiff's bill had been dismissed, *Andrew's v. Walton*, 1 McN. & G. 390; attending the registrar's office with his solicitor, to settle the terms of a decree, *Newton v. Acker*, 6 Hare, 319; or as a witness before a registrar in bankruptcy, *Ex parte v. Burt*, 2 M. D. & DeG. 606; a husband of a petitioner, who ought to have been, but was not a party to the cause, *Ex parte Britten*, 4 Jur. 943; 1 Mon. D. & D. 273; a bankrupt, during the forty days allowed for his examination, *Ex parte Helsby*, 1 Dea. & Ch. 16; *Ex parte Donley*, 7 Ves. 317; *Kimball's case*, 2 Ben. 33; 2 Bank. Reg. 114; a defendant attending a master under a warrant to produce papers, *Franklyn v. Calhoun*, 1 Madd. 580; *Sidgier v. Birch*, 9 Ves. 69; attending a motion against him, *Bromley v. Holland*, 5 Ves. 2; or before an arbitrator, *Moore v. Booth*, 3 Ves. 350; a common councilman summoned by the mayor of the corporation to attend an election ordered by *mandamus*, *Nixon v. Burt*, 7 Taunt. 642.

As to what constitutes an attendance: Merely being a suitor at the time of arrest is not sufficient, *Gray v. Ayres*, Tappan 164; a party while dining in the evening, after attending his cause all day in court, is exempt, *Lightfoot v. Cameron*, 2 W. Bl. 1113; *Newland v. Harland*, 8 Scott, 70; *Atty-Gen. v. Skinners Co.*, 8 Sim. 377; a plaintiff waiting in the vicinity of the court for his cause to be called, *Childerston v. Darrett*, 11 East 439; *Walker v. Webb*, 3 Anst. 941; *Ex parte Hurst*, 1 Wash. C. C. 183; waiting *redeundo*, in a picture shop on the way, not an unreasonable time (*Luntly v. ———*, 1 Cr. & M. 579); going into a tailor-shop on his way home, (*Pitt v. Coombs*, 3 Nev. & M. 212); during a detention of a month as a witness before a master, *Brown v. McDermott*, 2 Ir. Eq. 338; *Burk v. Higgins*, 2 Hogan, 110; *Gibbs v. Phillipson*, 1 Russ. & M. 19; during an adjournment of the examination by the master (*Ex parte Temple*, 2 Ves. & B. 395; *Spencer v. Newton*, 6 Ad. & El. 621; *Ex parte Russell*, 1 Rose, 278); a party going into another county to attend the taking of a deposition, in a suit pending although he afterward determined not to have it taken (*Wetherill v. Seltzinger*, 1 Miles 237); coming into town several days before his case was likely to be heard (*Ex parte Tullotson*, 2 Stark. 470; *Perse v. Perse*, 5 H. of L. Cas. 671).

The following are instances where a plea of privilege was overruled: Where the witness' attendance was voluntary (*Hardenbrook's case*, 8 Abb. Pr. 416); on service of a summons merely, without an arrest, (*Hopkins v. Coburn*, 1 Wend. 292; *Pollard v. Union Pac. R. R.*, 7 Abb. Pr. (N. S.) 70; *Legrant v. Bedinger*, 4 Mon. 533; *Hunter v. Ireland*, 1 Brev. 167; *Huntington v. Shultz*, Harp. 452; *Wilder v. Welch*, 1 McArthur, 566); where the defendant was in attendance as a suitor before United States land commissioners, (*Page v. Randall*, 6 Cal. 82).

A common informer is not protected, (*Ex parte Cobbett*, 7 El. & Bl. 955); nor a party attending court to assist his solicitor about duties properly the business of the solicitor,

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(*Flattery v. Anderson*, 6 Ir. Eq. 518); nor attending a court of bankruptcy on his own petition, (*Plover v. MacDonough*, 1 DeG. & Sm. 232); as to a creditor attending to prove his claim, (*Ex parte King*, 7 Ves. 312; *Ex parte Bryant*, 1 Madd. 49; *Ex parte Kerney*, 1 Atk. 55; *Ex parte Dick*, 2 W. Bl. 1149; *Kinder v. Williams*, 4 D. & E. 377); *alter*, where the bankrupt is attending to be examined, although the previous examination had been adjourned *sine die*, (*Ex parte Ross*, 1 Rose 260; *Kimball's case*, 2 Ben. 38); where a witness voluntarily leaves the place of trial, during a recess from Friday until Monday, (*Re v. Platt*, 3 W. N. C. 187).

"The privilege does not extend to criminal cases, as where the defendant had been brought into the State as a fugitive from justice, (*Williams v. Bacon*, 10 Wend. 638; *Com. v. Daniel*, 4 Clark (Penn. 49); after a discharge on a recognizance on a criminal charge (*Moore v. Green*, 73 N. C. 394; *Key v. Jetto*, 1 Pittsb. 117; *Scott v. Curtis*, 27 Vt. 739; *Hare v. Hyde*, 18 Q. B. 394; *Jacobs v. Jacobs*, 3 Dowl. P. C. 675; *Re v. Douglas*, 7 Jur. 39; *Anon.*, 1 Dowl. P. C. 157); or after a trial and acquittal, (*Goodwin v. Lordon*, 1 Ad. & El. 378; *Addicks v. Bush*, 1 Phila. 19); or trial and conviction (*Lucas v. Albee*, 1 Den. 666); but see *Bours v. Tuckerman*, 7 Johns. 583; *Re v. Wigley*, 7 Car. & P. 4; *Callans v. Sherry*, 41 & Nap. 125; *Gilpen v. Cohen*, L. R. (4 Exch.) 131; *Benninghoff v. Orvell*, 37 How. Pr. 235).

"Such an illegal arrest is no cause of abating the writ (*Booracm v. Wheeler*, 12 Vt. 311; see *Hubbard v. Sanborn*, 2 N. H. 463); a prior illegal arrest from which defendant was discharged, will not prevent a subsequent legal one. *Petric v. Fitzgerald*, 1 Daly, 401; *Van Wezel v. Van Wezel*, 1 Edw. Ch. 113; *Barrack v. Newton*, 1 Q. B. 535; *Andrews v. Walton*, 1 McN. & G. 380; *Twiers v. Newton*, 1 Q. B. 319; *Cartwright v. Keely*, 7 Taunt. 193; *Shults v. Andrews*, 54 How. Pr. 380; *Lagrange's case*, 14 Abb. Pr. (N. S.) 333; *Humphrey v. Cumming*, 5 Wend. 90; *Hart v. Kennedy*, 15 Abb. Pr. 290."

Adopting Mr. Stewart's citations on the points of deviation and delay, and waiver of the privilege, we add a few, and give the substance of all as follows: What constitutes a deviation or delay sufficient to forfeit the privilege. Going off his direct route in returning, to attend his son's funeral (*Chaffee v. Jones*, 19 Pick. 260); a delay of two days after submission to learn result of suit (*Clark v. Grant*, 2 Wend. 257); a delay of two weeks to attend to business (*Shults v. Andrews*, 54 How. 380); going some half a mile out of his way home, on his way to a solicitor's office to attend to other business (*Herron v. Stokes*, 6 Ir. Eq. 125); a barrister's stopping at a coffee-house, at two or three o'clock, P. M., on other business, the court having risen at one o'clock. *Strong v. Dickenson*, 1 M. & W. 466.

Contra: Merely stopping to announce to the counsel of the opposite party that no steps would be taken (*Sathinger v. Adler*, 3 Robt. 704); stopping over one train (*Wilder v. Boyer*, 1 W. N. C. 154); going to several places in a direction opposite to his residence, but within two hours after leaving court (*Selby v. Hulls*, 8 Bing. 166); going to an office for one or two hours to sort his papers, and then calling at a tailor's shop (*Pitt v. Coombes*, 5 B. & Ad. 1078); going some thirty yards off his route, on his way to his solicitor's to visit an exhibition of paintings (*Mahon v. Mahon*, 2 id. 440); stopping to dine with attorney and witnesses in the evening, the cause having gone off early in the day (*Lightfoot v. Cameron*, 2 W. Bl. 1113) staying over night and twenty-seven hours, being arrested when getting into the coach for home (*Hatch v. Blisset*, cited, 2 Str. 966); going from London to Clifton, on the way to the trial at Exeter, staying there two days to procure and sort his papers, with his lawyer, and select such as were necessary in the cause and which he had been required to produce (*Ricketts v. Gurney*, 7 Price, 699); delaying several hours to procure the attendance of his solicitor to go with him to see a deed, involved in the examination, in the hands of a hostile party (*Sidgier v. Birch*, 9 Ves. Jr. 61); going from court at Westminster to Pancras Lane, and there waiting for coach, although he had previously been to Catherine street, Strand (*Ex parte Clarke*, 3 Dea. & (Ch. 99); a solicitor residing in Wharton street, Pentonville, going to court at Westminster by way of Bagnigge Wells Road and Coppice Row, Clerkenwell, although others would have taken another route.

What amounts to a waiver of the privilege. Putting in bail (*Stewart v. Howard*, 15 Barb. 26); pleading in bar (*Randall v. Crandall*, 6 Hill, 343; *contra*, *Washburn v. Phelps*, 24 Vt. 506); failing to claim the privilege at time of arrest, and delaying twenty-two days before moving to set aside (*Panner v. Robbins*, 47 How. Pr. 415); obtaining a rule to show cause of action, and why he should not be discharged on bail (*Green v. Bmaffou*, 2 Miles

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219); confessing judgment (*Geyer v. Irwin*, 4 Dall. 197), giving bail for the prison bounds (*Tyfton v. Harris*, Peck, 414).

In *Bridges v. Sheldon*, U. S. Circuit Court, Vermont, December, 1880, before WHEELER, D. J., the case being in Vermont, one of the defendants having gone to Iowa to attend the taking of a deposition, under order of the master, the orator caused service of summons to be made upon him, in a suit in the Iowa State court, for same cause of action involved in this suit. *Held*, that such action was a contempt of court, whether so intended or not, and the suit having been removed to the Federal court, a stay of execution in this suit, until evidence of the discontinuance of the Iowa suit was filed, was granted the defendants, and they were allowed the expenses of such a suit, including reasonable counsel fees, imposed as a fine against the orator. The privilege to parties to judicial proceedings, as well as others required to attend upon them, of going to the place where they are held, and remaining so long as is necessary, and returning wholly free from the restraint of process in other civil proceedings, has always been well settled and favorably enforced. It is mentioned in the Year Book, 20 Henry VI, 10, and enforced to protect not only the body of a sailor from arrest, but his horse and other things necessary for his journey, which would otherwise be attachable, by the custom of London, from seizure for debt. Bac. Abr. "Privileges," 4, 17, 55; Selton Pr. 123; *Meekins v. Smith*, 1 H. Bl. 636; *Norris v. Beach*, 2 Johns. 294. It extends to every case where attendance is a duty in conducting any proceeding of a judicial nature (Bac. Abr. "Privilege," B 2; 1 Greenl. Ev., § 317); to attending upon an arbitrator under a rule of court (*Spence v. Stewart*, 3 East, 89); upon commissioners in bankruptcy (*Irding v. Flower*, 8 T. R. 594); to witness giving a deposition under an order of court (1 Greenl. Ev., § 347; *United States v. Edine*, 9 S. & B. 147); and to a party inquiring after evidence under leave of court. Bac. Abr. "Privilege," B 2. The privilege arises out of the authority and dignity of the court where the cause is pending, and protection against any violation of the privilege is to be enforced by that court, and will be respected by others. *Hurk's case*, 4 Dall. 387. A writ of protection issued out of that court is proper, but is not necessary, except for convenient and authentic notice to those about to do what would be a violation of the privilege. It neither establishes nor enlarges the privilege, but merely sets it forth, and commands due respect to it. *McNell's case*, 6 Mass. 245; 1 Greenl. Ev., § 216. See also *Hall's case*, 1 Tyler, 274; *Halsey v. Stewart*, 1 South. 306; *Miles v. McCullough*, 1 Binn. 77; *Blight v. Fisher*, 1 Pet. C. C. 41; *Watson v. Jones*, 13 Wall. 679; *Steiger v. Donn*, 4 Fed. Rep. 17; *Sugar Refinery v. Mather*, 2 Cliff. 304.

Plympton v. Winslow, U. S. Circuit Court, Southern District of New York, November, 1881. In a suit in a Massachusetts court it had been verbally agreed between the counsel for the parties that testimony should be taken before a special examiner in New York, and testimony was taken on the agreed day and adjournment had to the next day, when a written stipulation providing for the taking of the testimony was signed by the counsel, and in the interval of the adjournment the defendant was served with a subpoena to answer in a suit in New York. *Held*, that the service should be set aside on the ground that the privilege of the defendant was violated. BLATCHFORD, J., said: "The defendant had the right to attend upon the examination in person, whether he was to be himself examined as a witness or not, and he had a right to be protected while attending upon it from the service of the papers which were served in this suit. He attended in good faith, the examination was pending and unfinished, and he was served during the interval of an adjournment. The privilege violated was the privilege of the Massachusetts court, and one to be liberally construed for the due administration of justice. *Juncos Bank v. McSpedan*, 5 Biss. 64; *Durks v. Farwell*, 4 Fed. Rep. 166; *Bridges v. Sheldon*, 7 id. 17. The only objections urged against the motion are technical ones, that the written stipulation was not signed until after the service was made, that there was no order as to the examination entered in the Massachusetts court, that no formal written notice of the intended examination was served, and that the written stipulation cannot have an effect as of a date earlier than November 3d. It these objections were allowed to have force, the plaintiff would only be placed in the position of having, by the prior verbal arrangements made, sanctioned by the subsequent action of himself and his counsel thereunder, decoyed the defendant to visit New York by deceptive inducements, and thus the case would be brought within the principle laid down in *Union Sugar Refinery v. Mathieson*, 2 Cliff. 304, and in *Steiger v. Donn*, 4 Fed. Rep. 17. The plaintiff and his counsel, by what they said

and did, represented to the defendant that the proceeding before Mr. Thompson was regular and orderly, and authorized and induced him to rely on that view. He had a right, as a party to the Massachusetts suit, to attend a regular examination of witnesses in that suit in New York, and to be protected while so attending from the service of the papers in this suit. The plaintiff is estopped from raising the objections as to regularity."

In *Matthews v. Tufts*, New York Court of Appeals, 1882, it was held that where a person comes from another State to attend a meeting of creditors at the office of a register in bankruptcy, as a creditor and witness, to prove certain claims, or even as a party or as an attorney for other parties, he is privileged from service of process or summons, while so attending. The court observed: "In *Van Liew v. Johnson*, decided March, 1871, and referred to in *Person v. Grier*, 63 N. Y. 126; s. c., 23 Am. Rep. 35, a majority of this court were of opinion that a summons could not be served upon a defendant, a non-resident of the State, while attending a court in this State as a party. This immunity does not depend upon statutory provisions, but is deemed necessary for the due administration of justice. It is not confined to witnesses, but extends to parties as well, and is abundantly sustained by authority. *Cole v. Hawkins*, Andr. 275; s. c., 2 Str. 1094; *Arding v. Flower*, 8 I. R. 534; *Miles v. McCullough*, 1 Binn. 77; *Hayes v. Shleibs*, 2 Yeates, 222; *Parker v. Hotchkiss*, 1 Wall. Jr. 269; *JunEAU Bank v. McSpedan*, 5 Biss. 64; *Halsey v. Stewart*, 1 South. (N. J.) 866; *Müller v. Dugan*, 8 Va. 182; *In re Healey*, 53 Vt. 694. This exemption from service of civil process has been frequently accorded to creditors attending proceedings in bankruptcy (*Ex parte List*, 2 Ves. & R. 373; *Ex parte King*, 7 Ves. Jr. 312), and to a creditor who attended before the commissioners to propose himself as assignee, and watch the proceedings. *Selby v. Hills*, 8 Bing. 166. Commissioners in bankruptcy are a court of justice sufficient for the purpose of having their witnesses protected by the Court of Chancery, at least, if not by themselves. They sit in the nature of a court in the administration of justice. *Arding v. Flower*, 8 I. R. 534. In proceedings in bankruptcy the due administration of justice requires that all the creditors should be free to attend, without interference by service of process of any kind."

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

BAMBER V. SAVAGE.

(52 Wis. 110.)

Statute of frauds — memorandum — sale of lands at auction.

The agent of the vendor of real estate sold at auction cannot bind the purchaser by a memorandum thereof made and signed by him for the vendor alone, after the sale by the auctioneer, and not in any way assented to by the purchaser.

ACTION of damages for refusal to accept deed of lands sold at public auction. The opinion states the facts. The defendant had judgment below.

Murphey & Goodwin, for appellant.

Wilson Graham for respondent.

COLE, C. J. It is perfectly evident to us that in this case there was no sufficient memorandum of the sale made to take the case out of the statute. The statute makes every contract for the sale of lands, or of any interest therein, void, unless the contract, or some note or memorandum thereof expressing the consideration, be in writing, and be subscribed by the party by whom the sale is made, or by his lawfully authorized agent. Section 2304, R. S. The

learned County Court found upon the evidence that the lot was offered for sale, and was sold at auction by Dixon, as auctioneer, who was duly authorized by plaintiff to make the sale. There was evidence undoubtedly to support this finding, and we think it was according to the facts proven. It does not appear whether Dixon was a professional auctioneer or not. Certain it is that he made no memorandum of the sale. Whatever memorandum thereof was made appears to have been made by Mr. Connolly, who was employed by the plaintiff to sell the lot, and who subscribed the memorandum as the attorney and agent of the plaintiff.

The circumstances attending the sale and the making of this memorandum are in brief these: The property was sold on the 16th day of February, 1880, by Dixon, acting as auctioneer, who struck it off to the defendant for \$2,750, she being the highest bidder. Soon after the sale, in a conversation had between the plaintiff and the defendant, the latter verbally agreed to pay \$1,000 the next day, and the balance of the purchase-money before the plaintiff moved to Dakota, which he expected to do about the first of March following. Mr. Connolly states in his testimony that immediately after the sale he saw the defendant and asked her to make a deposit (it being understood that he was to receive the deposit as agent of the plaintiff and retain it until the sale was finally consummated), and the defendant made answer that she had no money with her, but she would make it all right with the plaintiff and wife, as they were old friends. He then drew up the memorandum in question. But it is clearly proven that this memorandum was never delivered to, nor accepted or assented to, by the defendant. Indeed it does not appear that the defendant ever knew of its existence until the time of the trial. It is not pretended that Connolly was acting as agent for the defendant, or had any authority to make the purchase for her. He was acting solely and exclusively as the agent of the plaintiff in whatever he said and did in the matter. This being so, upon what principle can it be claimed that the defendant is bound by the contract, and must make good the difference between the price which she agreed to pay for the property and the price at which it was subsequently sold to Eaves?

Where a memorandum containing all the essentials of the contract for the sale of land is made and signed at the time of the sale, by the auctioneer who sold it for the owner, it is well settled in law that this is sufficient to take the case out of the statute. The auc-

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tioneer is deemed to be the agent for both parties at a public sale for the purpose of signing the contract. *Benj. on Sales*, § 268; *Tullman v. Franklin*, 14 N. Y. 584. But "it has been decided that the memorandum of the auctioneer, to bind the purchaser, must be contemporaneous with the sale. It cannot be made afterward." STORY, J., in *Smith v. Arnold*, 5 Mason, 414-419. See also *Gill v. Bicknell*, 2 Cush. 355; *Horton v. McCarty*, 53 Me. 394. In this case, as we have said, the auctioneer made no memorandum. The person who did make it was Mr. Connolly, who was acting exclusively as the agent of the plaintiff in the transaction. He had no authority to act for the defendant, and did not assume to act for her, in making the contract. And it seems to us it would be an extraordinary position to hold that he, acting as agent of the vendor after the sale was made by the auctioneer, could draw up a memorandum of the contract, sign it on behalf of his principal, and bind the vendee, who never saw it or assented to its terms. If this memorandum is binding upon the defendant, who never saw it, it would follow that parol evidence would not be admissible to show that it was incorrect; and this, too, though made by a party in interest. We know of no case which affirms any such doctrine. It is worthy of remark that the memorandum does not include the terms of sale as set forth in the complaint or proven on the trial. By the memorandum it would be implied that the consideration money was to be paid by the bidder on the execution of a deed conveying a good title. But the complaint alleges in substance that the defendant agreed to pay \$1,000 on the next day after the sale, and the balance of the bid on or before the first day of March, 1880. The plaintiff testified that the defendant agreed to pay \$1,000 the next day after the sale, and the balance before he should go to Dakota. Now the doctrine contended for by plaintiff's counsel leads to this result: that he, as agent of the vendor, could draw up and subscribe the memorandum for his principal, settle the terms of an important contract, and bind the defendant, when she never saw the memorandum, and of course never assented to it. It needs no argument to show the unsoundness of such a position. There are cases which hold that where a contract for the sale of land has been signed by the vendor, and delivered to and accepted by the vendee, the latter is bound by its terms though he never executed it. *Vilas v. Dickinson*, 13 Wis. 488; *Lowber v. Connit*, 36 id. 177; *Hutchinson v. C. & N. W. Railway Co.*, 37 id. 582. But the doctrine of those

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cases does not aid the plaintiff, because here there was no acceptance of, or even assent to the terms of the memorandum, on the part of the defendant. And in any view which we have been able to take of the case, we think the judgment of the County Court is correct and must be affirmed.

Judgment affirmed.

VARNEY V. VARNEY.

(53 Wis. 120.)

Marriage — divorce — fraudulent concealment of woman's previous unchastity.

A marriage cannot be avoided by reason of the concealment by the woman, before the marriage, of her unchastity, nor of her fraudulent representation that she was chaste.*

ACTION of divorce. The opinion states the case. The plaintiff had judgment below.

D. W. C. Priest, for appellant.

Coleman & Spence, for respondent.

TAYLOR, J. This is an action brought by the respondent to obtain a divorce from the appellant on the ground of cruel and inhuman treatment, and failure to provide her with maintenance and support. The appellant denied the matters charged in respondent's complaint, and then, by way of counterclaim, alleged that the respondent had been guilty of adultery since her marriage with him, and demanded a judgment of divorce from the respondent upon such counterclaim. And as a separate defense and counterclaim, he alleged that his marriage with the respondent was procured through the fraudulent and false representations of the respondent as to her previous character for chastity, and asked the court to adjudge the nullity of the marriage on that account. Upon the trial of these several issues, the Circuit Court refused a divorce on the complaint of the respondent, for want of sufficient proof of the charges alleged against the appellant. The charge of adultery sub-

* To same effect, *Long v. Long* (77 N. C. 304), 24 Am. Rep. 449.

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sequent to the marriage, made by the appellant against the respondent, was abandoned by him upon the trial, he being wholly unable to establish the same by proofs. And upon the trial of his second counterclaim, upon which the court was asked to declare the marriage void on account of fraud, the court found against the appellant, dismissed such counterclaim, and ordered the appellant to pay T. W. Spence, one of the respondent's attorneys, the sum of \$575 as a sum necessary to enable her to carry on this action during its pendency to defend against the counterclaims set up in the appellant's answer.

The appellant appeals from the judgment of the court dismissing his counterclaim setting up fraud as a ground for declaring the marriage void, and upon this appeal he also claims that the court erred in awarding the said sum of \$575 as suit-money in favor of the respondent's attorneys. The allegations in the appellant's answer, setting up the alleged fraud on account of which he asks relief, are as follows: "That for the purpose of inducing this defendant to consent to said marriage, the plaintiff falsely and fraudulently represented that she was a chaste and virtuous woman, which representations the defendant believed and relied upon to be true;" "that the plaintiff was in fact unchaste and of lewd habits, and was the mother of an illegitimate child born out of wedlock, but which had died before such marriage with the defendant; which facts the plaintiff fraudulently concealed from this defendant, and which first became known to this defendant since the action was commenced and since the first answer was interposed herein; and that since the discovery of said facts, and that said representations were false, this defendant has not cohabited with the plaintiff."

The first and most important question in the case is, whether the concealment from her husband by the wife of her unchaste character previous to her marriage, or false representations made by her upon that subject previous to the marriage, in order to induce him to marry her, is such a fraud as renders the subsequent marriage void.

If a marriage can be avoided for the reasons above stated, it must be under the provisions of section 2350, R. S. 1878, which provides that, "whenever either of the parties to a marriage, for want of age or understanding, shall be incapable of assenting thereto, or when the consent of either party shall have been obtained by force or fraud and there shall have been no subsequent voluntary cohabitation

of the parties, the marriage shall be void from such time as shall be fixed by the judgment of a court of competent authority declaring the nullity thereof." It is clear, that under our statutes upon the subject of divorce, no fraud practiced by either party to the contract of marriage upon the other, previous to the marriage, is a ground for divorce. All divorces are granted for causes occurring after the marriage contract is entered into, except for impotency, and that is a cause which continues after marriage, though it exists before. But a judgment of nullity of the marriage contract proceeds upon matters occurring before or at the time the marriage contract is entered into. The appellant in this action, by his counterclaim, invoked the aid of the court to relieve him from the marriage, not on account of any misconduct of his wife subsequent to her marriage, but for her misconduct before ; and he insists that because she concealed her previous misconduct from him, and made false representations concerning it, in order to induce him to marry her, she obtained his consent to such marriage by fraud, within the meaning of said section, and he is therefore entitled to the judgment of the court declaring his marriage with her void.

The question whether the concealment of, or false representations as to the previous character of a female for chastity, made to the person who afterward marries her, and for the purpose of inducing him to do so, and upon which he relies, is such a fraud as will render the subsequent marriage void, has been frequently before the courts, both in this country and in England, and we are unable to find that any court has declared a marriage void for that reason. The furthest the courts have gone, is to hold that when such previous unchaste conduct has resulted in pregnancy, which exists at the time of the marriage and was unknown to the husband, the marriage will be declared void on account of the fraud. The question was very fully and ably discussed by the Supreme Court of Massachusetts, under a statute substantially like ours, in the case of *Reynolds v. Reynolds*, 3 Allen, 605. The argument in that case is so full and complete as to leave little room for adding to the conclusiveness thereof. I have therefore taken the liberty of quoting largely therefrom, as being the best method of stating the argument in the strongest and clearest manner. Chief Justice BIGELOW, who delivered the opinion in that case, says : "It is quite obvious, from the terms in which the statute is expressed, that it was founded on the assumption that a marriage into which one of the par-

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ties was induced to enter through the fraud and deception of the other, is null and void, and like other contracts, may be annulled and set aside by the defrauded party. * * * Nor does it define or in any way prescribe the nature of the fraud, or the degree or amount of deception which shall be deemed to be sufficient to warrant the court in adjudging the contract to be void. This is left to be determined on general principles applicable to all contracts, *subject only to such restrictions and modifications as necessarily arise and grow out of the peculiar nature of the contract of marriage.*"

After making some general remarks upon the nature of the fraud which will in general vitiate ordinary contracts relating to business, and remarking that the only general rule which can be safely stated is, that the misrepresentation or concealment must be of some material fact, the learned chief justice says: "While however marriage by our law is regarded as a purely civil contract, which may well be avoided and set aside on the ground of fraud, it is not to be supposed that every error or mistake into which a person may fall concerning the character or qualities of a wife or husband, *although occasioned by disingenuous or even false statements or practices, will afford sufficient reason for annulling an executed contract of marriage.* In the absence of force or duress, and where there is no mistake as to the identity of the person, any error or misapprehension as to personal traits or attributes, or concerning the position or circumstances in life of a party, is deemed wholly immaterial, and furnishes no good cause for divorce. Therefore no misconception as to the character, fortune, health or temper, however brought about, will support an allegation of fraud on which a dissolution of the marriage contract, when once executed, can be obtained in a court of justice. These are accidental qualities, which do not constitute the essential and material elements on which the marriage relation rests. The law, in the exercise of a wise and sound policy, seeks to render the contract of marriage, when once executed, as far as possible indissoluble. The great object of marriage in a civilized and Christian community is to secure the existence and permanence of the family relation, and to insure the legitimacy of offspring."

The learned chief justice then lays down the rule that as to all matters which relate to fortune, health and character, including chastity, of the person with whom a contract of marriage is made, the parties are bound to make their own in-

vestigations and inquiries before the contract is consummated; and when the contract is consummated without force and without any mistake as to identity, the courts will not permit any inquiry into those matters for the purpose of avoiding the contract, and then proceeds as follows: "The law therefore wisely requires that persons who act on representations or belief in regard to such matters, should bear the consequences which flow from contracts into which they have voluntarily entered, after they have been executed, and affords no relief for the results of a 'blind credulity, however it may have been produced.' * * * Nor is it unreasonable that each one should take on himself the burden of inquiring into representations concerning the character and qualities of the person whom he intends to marry, which by the exercise of due caution and discretion, can be ascertained to be true or false, instead of lying by and using them to defeat a contract after it has become executed and a portion of its fruits has been enjoyed."

The learned chief justice then states that some of the civil law writers have thought that antenuptial incontinence and want of chastity in a woman was a good ground for avoiding the marriage, when it was concealed from the husband and he was led to believe that she was chaste and virtuous; but he adds: "The better opinion seems to be that chastity stands on the same ground as other personal qualities; that there is nothing in the contract of marriage which implies that a woman shall have previously been pure and undefiled, or which renders unchastity prior to the execution of the contract an impediment to a valid marriage. * * * Nothing can avoid it which does not amount to a fraud in the *essentialia* of the marriage relation. And as mere incontinence in a woman prior to her entrance into the marriage contract, not resulting in pregnancy (existing at the time of the marriage), does not necessarily prevent her from being a faithful wife, or from bearing to her husband the pure offspring of his loins, there seems to be no sufficient reason for holding misrepresentation or concealment on the subject of chastity to be such a fraud as to afford a valid ground for declaring a consummated marriage void. In regard to continence, as well as to other personal traits and attributes of character, it is the duty of a party to make due inquiry beforehand, and not to ask the law to relieve him from a position into which his own indiscretion or want of diligence has led him. Certainly it would lead to disastrous consequences, if a woman who had once fallen from virtue

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could not be permitted to represent herself as continent, and thus restore herself to the rights and privileges of her sex and enter into matrimony, without incurring the risk of being put away by her husband on discovery of her previous immorality. Such a doctrine is inconsistent with reason and a wise and sound policy."

The doctrine of this case is fully sustained by all the authorities cited by the learned counsel for the respective parties, and we do not find that a contrary rule has been held by any court where a similar question has been raised. See *Perrin v. Perrin*, 1 Addams Ec., 1; *Reeves v. Reeves*, 2 Phill. Ec., 125; *Graves v. Graves*, 3 Curteis Ec., 235; *Scroggins v. Scroggins*, 3 Dev. (N. C.), 535; *Leavitt v. Leavitt*, 13 Mich. 452-456; *Benton v. Benton*, 1 Day, 111; *Baker v. Baker*, 13 Cal. 87; *Foss v. Foss*, 12 Allen, 26; *Crehore v. Crehore*, 97 Mass. 330; Bish. on Mar. and Div., §§ 167, 168, 180-190, and cases cited. Bishop says, section 167: "When the question comes before a tribunal, whether a particular contract is void by reason of fraud shown to have entered into its original constitution, many things may demand consideration. Among these things the nature of the contract must be taken into account; for what would avoid one kind of contract may not necessarily be sufficient to avoid another. In that contract of marriage which forms the gateway to the *status* of marriage, the parties take each other for better, for worse, for richer, for poorer, to cherish each other in sickness and in health; consequently a mistake, whether resulting from accident, or indeed generally from fraudulent practices, in respect to the character, fortune, health, does not render void what is done. To this conclusion all the authorities conduct us, but different modes for stating the reason for it have been adopted." He then gives Lord STOWELL's reason as follows: "A man who means to act upon such representations should verify them by his own inquiries. The law presumes that he uses due caution in a matter in which his happiness for life is so materially involved, and it makes no provision for the relief of a blind credulity, however it may have been produced." *Wakefield v. Mackay*, 1 Phill. 134, 137. Bishop's own opinion, as expressed in section 168, is "that the nature of the marriage contract forbids its validity to rest upon any stipulations concerning these accidental qualities. If a man should, in words, agree with the woman to be her husband only on condition of her proving so rich, so virtuous, so wise, so healthy, of such a standing in so-

ciety, yet if he afterward celebrates the nuptials on her representing herself to possess the stipulated qualities, while in truth she is destitute of them, still in such celebration he says to her, in effect and in law, "I take you to be my wife whether you have the qualities or not, whether you have deceived me or not." In other words, he waives the condition. To carry such condition into the marital relation would violate its spirit and purpose, and be contrary to good morals."

These cases, we think, clearly establish the doctrine that the counterclaim of the defendant, alleging fraud as a ground for avoiding the marriage contract, does not state facts sufficient to authorize the court to declare the contract void, had they all been fully proved on the trial. Notwithstanding the learned counsel for the appellant seemed to think these decisions were not in accord with the spirit of progress which pervades our present high state of civilization, we are unable to agree with him in that statement. We are clearly of the opinion that the highest and best interests of present society demand that these doctrines of the courts, which have come down to us from the time of the earliest Christian civilization, should still be adhered to, especially in this country, where if a previously unchaste woman enters into marriage without reformation in fact, the mistaken husband has abundant means of getting rid of his unfortunate alliance in an action for a divorce for her misconduct after marriage; and if she enters the married state reformed and continues faithful to her marriage vows, every consideration of justice and humanity demands that the past should be considered forgiven and forgotten. This view of the case renders it unnecessary to consider the question whether the appellant had notice of the previous unchaste character of his wife before his marriage with her.

[Omitting minor questions.]

By the Court.—The judgment of the Circuit Court is affirmed.

CROCKETT v. State.

CROCKETT v. STATE.

(82 Wis. 211.)

Jury — officer in room during deliberations.

The officer in charge of a jury in a capital case was permitted by the court to remain in the room during their deliberations. *Held*, no error.*

CONVICTION of murder. The opinion states the case.

Chas. W. Felker, for plaintiff in error.

Attorney-General and *H. O. Fairchild*, district attorney, for defendant in error.

COLE, C. J. [Omitting other points.] When the cause was finally submitted, an officer was sworn to take charge of the jury. The learned Circuit judge told the officer that he might remain in the room with the jury while they were deliberating, but at the same time cautioned such officer, in case the jury agreed, not to disclose the verdict to any one, nor to communicate to any one the progress or result of the deliberations of the jury. We think the fact is fully established by the affidavits, that the officer remained in the room with the jury while they were considering of their verdict, for the purpose of attending to the fire or furnishing the jury with water; but there is nothing whatever to show that he took any part in their deliberations or attempted in any manner to influence the verdict. But it is insisted by the learned counsel for the plaintiff in error, that the mere presence of the officer in the room while the jury were considering of their verdict affords a sufficient ground for granting a new trial. It is said the due administration of justice requires that the utmost privacy should attend the deliberations of the jury; that it is often necessary for the jury to comment upon the testimony of witnesses, weigh their conflicting statements, and ascertain the real fact in issue; and that the presence of an officer, whose friends may have been witnesses on the trial, will prevent that full interchange of views and free criticism in which the jury would indulge if left entirely alone. There is undoubtedly force in

* To same effect, *Gatney v. People* (97 Ill. 270), 37 Am. Rep. 109.

these observations. But still we must presume, in the absence of all showing to the contrary, that the officer was a proper person to take charge of the jury; that his presence in the room with them would not tend to embarrass their deliberations; and that he was entirely disinterested as to the result of the trial. It certainly will not do to assume that the learned Circuit judge would have placed the jury in charge of an officer who had shown an undue interest in the event of the cause, or whose friends had been material witnesses on the trial, so as to render the presence of the officer in the room with the jury a restraint upon their deliberations. Indeed, there is nothing to show that the officer in this case was guilty of any misconduct, or was unfaithful in the discharge of his sworn duty. Our statute upon the subject of criminal trials in justice's court provides, that after the jury have heard the proofs and allegations in the case they shall be kept together in some convenient place until they agree on a verdict or are discharged by the court; and an officer shall be sworn to take charge of them, in like manner as upon trials in justice's court in civil proceedings. § 4757, R. S.

In the justice's act, the form of the oath which is administered to the officer is given. No form of oath is prescribed for the Circuit Court, but doubtless the same oath substantially is administered to the officer as that taken in the justice's court. See § 3652, R. S. That is, the officer is usually sworn to keep the jury together in some private and convenient place without drink, except water; not to suffer any person to speak to them, nor to speak to them himself, unless by order of the court, except to ask if they have agreed upon their verdict, until they have so agreed, or have been discharged; not to communicate to any person the state of their deliberations, or the verdict which they have agreed upon. Presumably an oath of this character was administered to the officer in this case. The language of such an oath implies that the officer is to be near the jury so as to prevent any communication, orally or otherwise, from being made to them, and where he may know the state of their deliberations. It is frequently the practice in this State for him to remain in the room with the jury, though of course he should religiously refrain from taking any part whatever in their conversation or discussions. But if the officer is a proper person to take charge of a jury, especially where, as in this case, the court directs him to remain in the room with the jury while they are considering of their verdict, we can see no valid objection to the prac-

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tice. If in the room with the jury he is in a much better position to prevent any communication from being made to them by third parties to influence their verdict, than if he were away out of their sight and hearing. This must be obvious to any one reflecting a moment upon the subject. The only doubt we have had upon this point arises from the recent decision of the Supreme Court of Michigan in *People v. Knapp*, 42 Mich. 267; s. c., 36 Am. Rep. 438. In that case it was held that if the officer in charge of the jury remain present in the room during the deliberations of such jury, though he may do nothing but listen, and it does not appear that a party has been prejudiced thereby, yet this will be a good ground for setting aside the verdict. We have examined with some care the opinion in that case, and confess, while we have the highest respect for the decisions of that able and enlightened tribunal, we are unable to adopt its reasoning. We do not care to make any further comment upon the decision than to say it is not satisfactory to our minds, and we decline to follow it. This disposes of all the material points relied on for a reversal of the judgment.

By the Court.—The judgment of the Circuit Court is affirmed.

Judgment affirmed.

LIPSKY V. BORGMANN.

(52 Wis. 256.)

Real property — structure for dancing.

A wooden structure, built and used for dancing, of light materials, resting partly on the ground and partly on posts set in the ground, and roofed with brush, with a door opening into the owner's adjacent dwelling and saloon, with seats for musicians, between the two buildings, on cross pieces fastened to both, is real estate.

ACTION of trespass on land. The opinion states the facts. The plaintiff had judgment below.

Timlin & Mauseau, for appellant.

H. G. & W. J. Turner, for respondent.

ORON, J. [Omitting minor considerations.] There is a dwelling-house on the land, occupied by the plaintiff and his family

as a residence, and used also as a saloon. The building in question is erected on one side of this main building, and next to the saloon, and built there by the plaintiff for the purpose of being used in connection with the saloon as a dancing hall. It is thirty-two feet square, the sills are fastened together at the ends with nails or spikes, the studding is fastened to the sills in the same way, and four or five feet apart, and on the top of the studding are fastened the plates in the same way; and the sills and plates are thirty-two feet in length and two by eight or two by ten inches square. The sills rest at some places on the ground and at other places on cedar posts set into the ground and on cedar railroad ties and stones. A floor is laid over the whole space, in the center of which stands a post eight feet high and six by eight inches square, from the top of which extend four rafters to the plates. The roof is intended to be square and four-cornered, and now consists of brush. There is a space between the buildings and in it are constructed seats for the musicians, twelve feet long, upon cross pieces fastened to both buildings, and a door is intended to open from the saloon into the dancing hall. It is in an unfinished condition, but used for the purpose intended; and it is intended to be made more complete and permanent, and to permanently remain, to be used in connection with the main building for domestic purposes, and in connection with the saloon business, as a dancing hall. The testimony on behalf of the defendant as to the frail character of this building, and the testimony offered by him and rejected, as to similar structures and how they were regarded, do not in the least militate against this statement of the evidence. As the Circuit Court virtually took the question from the jury, and decided that from this evidence this building was a fixture, the question here is, would the jury have been justified in finding otherwise? or in other words, would the verdict be allowed to stand, on motion for a new trial, if they had so found? If not, the Circuit Court committed no error in taking the question from the jury and so deciding. From the character, situation and intended use of this building, as disclosed by this evidence, there can be no question that it was affixed to the soil and is a part of the realty. By the current of authorities it has all the requisites to make it such. It was constructed by the owner of the land. It has sufficient actual physical attachment to the main building and the soil, and was intended to be permanent, and to be always used, not only with the main building but for similar

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purposes, and not intended ever to be removed. To support this ruling, I need only to refer to some of the late decisions of this court, and in cases where the facts were not nearly as conclusive as in this case, and yet the constructions were held to be fixtures, and not personalties. *Huebschmann v. McHenry*, 29 Wis. 655; *Kimball v. Darling*, 32 id. 675; *Jenkins v. McCurdy*, 48 id. 628; s. c., 33 Am. Rep. 841; and *Taylor v. Collins*, 51 id. 123. We can find no error in the record.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

PIERCE V. SEYMOUR.

(52 Wis. 272.)

Limitations — statute of — promise, when sufficient to revive debt.

Nothing short of an unqualified written promise to pay will revive a debt against which the Statute of Limitations has run.*

SUFFICIENTLY reported in note, 36 Am. Rep. 197.

DE FORTH V WISCONSIN & MINNESOTA RAILROAD COMPANY.

(52 Wis. 320.)

Sunday — "business."

Precuring signatures of tax payers to a petition to a board of supervisors to issue railroad-aid bonds, is "business," and if done on Sunday confers no authority to issue the bonds.†

ACTION to restrain a board of supervisors from issuing, and a railway company from receiving, town aid bonds. The opinion states the point. The plaintiff had judgment below.

Edwin H. Abbot and *S. U. Pinney*, for appellant.

R. J. McBridge, and *James O'Neill*, for respondent.

* "I will pay it as soon as possible;" held, sufficient. *Norton v. Shepard*, 48 Conn.

† See *Parker v. Pitts*, ante, 156.

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TAYLOR, J. The allegations of the complaint show that it was necessary to have nineteen signatures of resident tax payers of the town to the petition in order to justify the issuing of the bonds, and that only six of these signatures were made on any secular day; all the others were made on Sunday. The real and material question in this case is, whether a petition signed by the resident tax payers on Sunday is a lawful petition, under the provisions of section 946, and would justify the issuing of the bonds of the town under said section. Section 4595, Rev. Stats., makes it unlawful "to do any manner of labor, business or work, except only works of necessity and charity," on the first day of the week, or Sunday. It was held by this court in *Troewert v. Decker*, 51 Wis. 46; s. c., 37 Am. Rep. 808, that the loaning of money and giving a note therefor was business, within the meaning of this statute; and it appears to us perfectly clear that going about and procuring the signatures to a petition of the tax payers of a town, upon the presentation of which, properly signed, to the clerk of such town, the board of supervisors thereof would be authorized to execute and deliver to a railroad company the bonds of the town for a large sum of money, and pledge the credit thereof for the payment of the same and the interest thereon, is a very important business, so far as the railroad company and the town are concerned. We also think that when the tax payer subscribes his name to such petition he is doing business within the meaning of such statute. He is doing that which, if lawfully done, would authorize the incurring of a large indebtedness on the part of the town, and the granting of a large pecuniary benefit to the railroad company soliciting such signatures. One of the definitions of the word "business," given by Webster, is a "transaction." The signing of the petition was a very important part of a very important transaction between the railroad company and the town—so important that unless the signatures were obtained there would be no authority for the board of supervisors to issue the bonds, and no right on the part of the company to demand their issue. Without it the board would be devoid of any power to bind the town for the payment of any bonds they might issue in its name in aid of the railroad company. The fact that there was a petition signed by the proper number of resident tax payers, is made, by the provisions of section 946, the very foundation of the authority of the town officers to bind the town by issuing its bonds.

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The defendant company having violated the law in procuring the signature of the tax payers to the petition, and the petitioners having also violated the law by signing the same on Sunday, it would seem to follow as a legal consequence that the company can derive no rights through or by virtue of such illegal action on its part. But the learned counsel for the appellant argues with much earnestness and ability, that because the petition was presented on a secular day, signed with the names of a sufficient number of the tax payers of the town, the town board not only had the power to act upon such petition without inquiry as to the time when the signatures were made, but that the company had the right to compel their action if they refused. The argument seems to go the length of holding that if the proper number of genuine signatures are attached to the petition when presented to the clerk, neither the town board nor any one else can question the methods by which such signatures were obtained. This we think is clearly a mistaken view of the question. It seems very clearly to us that the sufficiency of the petition might be impeached by showing that the signatures were obtained by force or fraud; and there does not appear to us any good reason why its validity cannot be impeached by showing that the signatures were obtained in violation of the Sunday law. If a man gives his note on Sunday as the consideration for goods sold or money loaned, he may show the fact as defense, in an action to recover upon such note. He does not deny his promise or his signature; he admits that he has had the goods sold or the money loaned; and yet the law says that the holder of the instrument cannot recover, because it was given in violation of the statute. In both the giving and taking of the note the statute was violated; and because the person taking the note was equally guilty with the maker of the same, the courts will not aid him in enforcing his contract so made. The contract in itself is not illegal, but because the making of it on Sunday was a violation of a criminal statute, it cannot be enforced.

Will a court of equity permit a party to make use of a petition which is in the nature of a request or power of attorney, authorizing the town authorities to issue to him the bonds of a town, which shall be a charge upon the property of the petitioners and all other tax payers of the town, when it appears that such party obtained the signatures of the petitioners by an act which was a violation of the criminal laws of the State? If the appellant were proceeding

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against the officers of the town to compel the issuing of the bonds, there would not seem to be any doubt as to the right of the town authorities to set up the unlawful act of the appellant in procuring the signatures, as a defense to the action. The law having required the appellant to procure the signatures of the tax payers to the petition before it is authorized to call upon the authorities to issue the bonds, the petition is the very foundation of the appellant's right, and when it is shown that the appellant violated the law in procuring the signatures, he is not in a position to ask the aid of a court to enforce a claim against the town founded upon such petition. In such case, the right depending upon the validity of the petition, it is no answer that in the first instance the appellant could make out a case without showing that it had violated any law. In such action the appellant's right to relief would rest upon the petition, and it being shown that the petition was obtained by an act which violates the criminal laws of the State, the court cannot grant the relief any more than in favor of the payee of a note made on Sunday. The payee, in his action, can make out his case without showing any violation of the law. He introduces his note, and he has made a case. The note may or may not show on its face that it was made on Sunday, and even though the date might show that fact, yet in favor of the legality of the contract the court in the absence of other proofs, would probably presume, that notwithstanding the date, it was in fact delivered on a secular day. The proof of the illegal act of the payee comes from the defendant; but when made it shows that he cannot recover except by virtue of the contract which was made in violation of law, and his case fails.

This question was discussed and disposed of in the case of *Myers v. Meinrath*, 101 Mass. 366; s. c., 3 Am. Rep. 368. Upon this question Justice WELLS, who delivered the opinion, says: "The plaintiff concludes that the rule does not apply, because he does not seek to enforce any rights which depend at all upon the illegal transaction; that both the legal title which he asserts, and the proofs by which he maintains that title, not only omit to disclose, but utterly disregard the unlawful sale; whereas it is the defendant who is obliged to set up the illegal conduct of himself and the plaintiff alike, in order to justify his retention of the plaintiff's property. But the illegality lies directly in the course of events which placed the property in the hands of the defendant, and made it necessary

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for the plaintiff to resort to this suit to regain it. It is inseparably connected with the origin of the cause of action, *and it is immaterial which party discloses it to the court.*" We think it very clear that the appellant could not succeed in an action to compel the delivery of the bonds upon such petition.

The learned counsel for the appellant also insists that if a court of equity would not aid the appellant in enforcing the delivery of the bonds, neither will it aid this plaintiff in his action to restrain the issuing of them, for the reason that he has shown himself equally guilty as the appellant of a violation of the law.

To this there are several answers: *First*, it does not appear with certainty from the complaint that the plaintiff was one of the persons and tax payers who signed the petition on Sunday; *second*, the plaintiff has made out a case by showing that the petition was invalid, by the fact that twelve tax payers other than himself signed on Sunday, each one of whose signatures was necessary to the sufficiency of the petition in respect to numbers; *third*, there does not appear to be any good reason why the plaintiff may not protect his property rights against a claim made against them by the appellant, which is based upon an unexecuted contract made in violation of law. The plaintiff makes out a good cause for relief when he shows that the petition was signed by less than half of the resident tax payers of the town, including himself, and excluding those other than himself who signed on Sunday. He need not and does not question his own signature in order to avoid the effect of it. He shows it wholly ineffectual without regard to his own connection therewith. But suppose it necessary for the plaintiff to allege that the petition is ineffectual because his signature was obtained thereto on Sunday, will this prevent him from successfully invoking the aid of a court of equity to restrain the defendant company from obtaining any rights against himself and the other taxpayers of the town, based upon such signature so made? We think this question must be answered in the negative. The plaintiff does not seek to maintain his rights upon the alleged insufficient petition. His demand for relief against the threatened unlawful taxation of his property by the officers of the town and the defendant company is based upon the proposition that the company has not taken the steps required by the statute to authorize such taxation; and in order to show that, he shows that the petition they have obtained was obtained in such manner that neither a court of law nor of

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equity will permit its use by the company to found any right thereon. He only questions the right of the company to the bonds. His own right to have his land free from taxation to pay the principal and interest of bonds issued in aid of the defendant railroad company is predicated upon the want of power in the officers of the town to charge his property with such tax. The officers and company claim the power by virtue of the petition, and threaten to execute such power, notwithstanding the fact that it is admitted that it was illegally obtained and is therefore ineffectual to confer upon the town officers the right to impose such tax.

It seems to us that the town and defendant company are in no better position to claim the right to have these bonds issued, than a party would be who claimed the enforcement of an executory contract made on Sunday. Upon such contract, if it be for the delivery of goods, and the delivery be not in fact made, the vendee acquires no title to the same. The contract to deliver, having been made on Sunday, is ineffectual to compel the vendor to make the delivery; and if the vendee should take possession of them without the consent of the vendor, he would be a mere trespasser, and the vendor could maintain any proper action against him to recover the possession of the same, or the value thereof, notwithstanding his executory contract made on Sunday; and the fact that such executory contract was made by the plaintiff would be no defense to such action. If the contract made on Sunday is fully executed, it is as effectual to fix the rights of the parties as though made on any other day; but if it be merely executory, or some part of it be executory, it is simply void as to such unexecuted part, or at least ineffectual to confer any rights under it, and neither party can enforce the same. This was held by this court in the case of *Troewert v. Decker*, *supra*, and the cases cited therein. See also, *Smith v. Bean*, 15 N. H. 577.

In the case of *Clough v. Davis*, 9 N. H. 500, a note was executed on Sunday and put in the hands of another to deliver on Monday, and it was so delivered. The court says: "The note was written and signed on Sunday, but not delivered. The contract was not completed. The instrument given in evidence was not a subsisting contract on Sunday, nor so regarded by either party. It was wholly inoperative, unless something more had been done. But the note was placed in the hands of an agent with authority to deliver it upon the next day, and he did deliver it accordingly. If

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however a secular contract made on the Sabbath is prohibited, and therefore void, the authority to the agent, for the same reason, is equally against law and void." The court further said, that the proof showing that the defendant had promised to pay the note after its delivery, such promise was a ratification of the act of the person who delivered the same, and bound the defendant. This case is commented upon in *Smith v. Bean, supra*, as follows: "But there the note was written on Sunday and given to an agent with authority to deliver it on Monday. No contract was completed on Sunday, but something remained to be done. The attempt to confer the authority on Sunday was ineffectual. It was the simple case of a person assuming to act as agent for another without authority. But the note came into the hands of the payee, whether with or without an original authority was immaterial, for while it was there the defendant promised to pay it, and thus made a new contract."

In the case at bar, the most that the plaintiff and the other petitioners did who signed on Sunday, was to authorize the agent of the defendant company to present such petition, so signed by them, on some secular day, and demand the issuing of the bonds according to the proposition made by the town. This contract or authority, being given on Sunday, was ineffectual and void, and within the authorities above cited, would confer no power upon the company, having notice of the fact, to lawfully demand or receive the bonds, even though such power had never been formally revoked by the parties giving the same. No rights could be acquired under such authority given on Sunday, by any person having knowledge of the facts, except upon clear proof that the signers had ratified the authority of the company by some subsequent act on a secular day.

Whether a court of equity would release the plaintiff, or other persons in the same situation, had he permitted the petition to be used and the bonds issued, and after the company had expended money in constructing the proposed road, relying upon the validity of such bonds, is not a question in this case. The complaint shows that the plaintiff proceeded promptly to notify the town authorities and the defendant company, that he did not propose to ratify in any way the illegal and void authority which the company had filed with the town clerk as a basis for the demand of the bonds. This suit was commenced within about three weeks after the

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petition was signed and filed in the clerk's office, and it nowhere appears from the complaint that the company had changed its position in any way in reliance upon its rights to these bonds.

The plaintiff stands in a similar situation to a party who, on Sunday, authorized a third person, as his agent, to execute a contract for him or deliver property on some secular day, and who forbids the execution or delivery before it is effected. In such case, so far as such party's rights are concerned, he stands in the same situation as if no such authority had been given, and such third person cannot make such ineffectual and revoked authority a foundation for the assertion of any right on his part. In such case there is no reason why a court of equity should not lend its aid to protect the rights of the party who has revoked such agency, especially in a case like the one at bar, where the party against whom such aid is sought is seeking to enforce the contract without showing that any property or other consideration has been given to and received by the party insisting upon such revocation, and which he refuses to restore; in short, when the contract sought to be enforced is wholly unexecuted on both sides. Had the contract been executed by one party, there would be great force in the argument that a court of equity would not aid the other in avoiding the contract on his part. This is not a case of that kind. It is simply a proceeding to prevent the completion of a contract, pending its negotiation, and while still unexecuted by either party. We think the plaintiff has a good standing in a court of equity, and a clear right to the relief demanded.

The objection made by the learned counsel for the appellant that the complaint does not allege that the signers of the petition, who signed on Sunday, were not "persons who conscientiously believed that the seventh or any other day of the week ought to be observed as the Sabbath," etc., as prescribed in section 4596, R. S., and is bad for that reason, is not, we think, sustained by the authorities. This was one of the points decided in the case of *Troewert v. Decker*, in this court, and was decided against the theory of the appellant upon the authority of the cases of *Bosworth v. Swansey*, 10 Met. 363; *Jones v. Andover*, 10 Allen, 18, 21; and *Hinckley v. Penobscot*, 42 Me. 89. It is true, these cases arose upon the exceptions contained in section 4595; but the principle is, we think, the same as to the exceptions contained in the next section. These cases hold that the legal presumption is against the validity of an act done on Sunday,

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and it is for the party who alleges that the act is valid, notwithstanding that fact, to make the proof showing either that the act done was one of the excepted ones, or that the person performing the act was one of the persons excepted from the provisions of the statute.

Having come to the conclusion that the petition was wholly ineffectual under the statute to authorize the appellant to demand the bonds of the town, or to authorize the officers thereof to issue and deliver them to the appellant, and that the plaintiff is not in such situation in regard to the transaction as to prevent him from invoking the aid of the court for the purpose of prohibiting the threatened illegal proceedings on the part of the appellant and town officers, it becomes unnecessary, in the disposition of this case, to pass upon the constitutionality of the act under which the proceedings were had.

[Omitting a question of costs.]

By the Court.—The judgment of the Circuit Court is affirmed.

Judgment affirmed.

PARCHER V. MARATHON COUNTY.

(52 Wis. 388.)

Payment — voluntary — taxes, under protest.

Payment under protest of an illegal tax, on demand by the sheriff, to prevent levy and sale, is not voluntary, although there was no present threat of levy.

ACTION to recover amount paid for an illegal tax. The opinion states the point. The defendant had judgment below.

James & Crosby, for appellant.

C. F. Eldred, for respondent.

LYON, J. It is not denied that the complaint states a cause of action. The testimony given on the trial tended to prove the material averments in the complaint, and was undoubtedly sufficient to support a verdict for the plaintiffs had the jury found for them. The only question litigated on the trial was, whether or not the

plaintiffs paid the illegal tax voluntarily. On this question, after submitting to the jury the question whether the payment was made by them with the view of preventing a levy upon and seizure of their goods, with an instruction that if made for that purpose the plaintiffs should recover, the learned Circuit judge further instructed the jury as follows: "It is not enough that an officer gets a warrant in his hand and notifies all tax payers, 'The amount of this tax must be paid, or I will enforce the collection by levy.' That is not enough. It must be a present purpose, an intent, of levying—of taking the goods then and there; not that he will do so in the course of some future days, but that he intends to levy, and having that intention and purpose, and warrant of authority to do it, the party pays to prevent his goods being seized—if he does it under such circumstances it is compulsory payment. If it is not under such circumstances, it is what the law calls a voluntary payment. However the man may squirm about the tax, it is called a voluntary payment, and he cannot recover it back. A threat to levy, to levy now at the time, and with the purpose to take the goods then and there, and the money paid then and there to prevent the act, is what is meant by compulsory payment in the law; and a person who pays that way, the tax being illegal, can recover it back, not otherwise."

In *Van Buren v. Downing*, 41 Wis. 122, this court had occasion to consider the question of the liability of an officer or agent to refund an illegal tax or duty collected by him and paid over to his principal. The defendant in that case was an assistant treasury agent, and as such collected of the plaintiff a license fee imposed by a statute afterward adjudged invalid, and paid the fee into the State treasury. The action was to recover back the sum so paid. Because the plaintiff did not pay the fee under protest, or deny his liability therefor, or notify the agent of his intention to bring suit to recover it back, we held the payment voluntary, and that the agent was not liable after he had paid the money into the treasury in good faith. The cases cited in the opinion abundantly show that the rule of the liability of officers or agents in such cases is correctly stated in *Erskine v. Van Arsdale*, 15 Wall. 75. That was an action against a collector of internal revenue to recover the amount of an illegal tax assessed against and paid by Van Arsdale. This is the rule laid down by the court: "Taxes illegally assessed and paid may always be recovered back if the collector understands

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from the payer that the taxes are regarded as illegal, and that suit will be instituted to compel the refunding of them." Judge Cooley, in his treatise on the Law of Taxation, says that "all payments of taxes are supposed to be voluntary which are not made under protest or under the apparent compulsion of legal process," and that "when a protest is relied upon, nothing very formal is requisite." Page 548. He also quotes approvingly the rule laid down by the Supreme Court of the United States in *Erskine v. Van Arsdale*, *supra*.

Such is the rule in an action against the officer or agent to whom the money was paid in the first instance. Certainly no stronger rule prevails in favor of the principal after the money has been paid over by such officer or agent. Indeed, there are authorities to the effect that the rule is more favorable to the plaintiff in the latter case than when the action is against the officer or agent. This distinction is mentioned in *Atwell v. Zeluff*, 26 Mich. 118. We need not discuss this distinction. We prefer to consider this case on the theory that to entitle the plaintiff to recover against the county he must make as strong a case as he would be required to make were his action against the sheriff. *Atwell v. Zeluff* is an instructive case on the general question of what are and what are not voluntary payments. The rule is there stated as follows: "Where an officer demands a sum of money under a warrant directing him to enforce it, the party of whom he demands it may fairly assume that if he seeks to act under the process at all, he will make it effectual. The demand itself is equivalent to a service of the writ on the person. Any payment is to be regarded as involuntary which is made under a claim involving the use of force as an alternative, as the party of whom it is demanded cannot be compelled or expected to await actual force, and cannot be held to expect that an officer will desist after once making demand. The exhibition of a warrant directing forcible proceedings, and the receipt of money thereon, will be in such case equivalent to actual compulsion." We do not say that we would assent to that rule as broadly as there stated. Perhaps a protest, at least, should be required, especially if the action be brought against the officer or agent after he has paid over to his principal the money illegally collected. The opinion in the Michigan case recognizes the hardship of the rule, and suggests a modification of it by the legislature.

But whether the rule of the Michigan case is or is not correct, we

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think it must be held, on principle and authority, that the payment of a demand under compulsion of legal process, such payment being accompanied by a protest that the demand is illegal and that the payer intends to take measures to recover back the money paid, is not a voluntary payment. And further, to constitute compulsion of legal process it is not essential that the officer has seized, or is immediately about to seize, the property of the payer by virtue of his process. It is sufficient if the officer demands payment by virtue thereof, and manifests an intention to enforce collection by seizure and sale of the payer's property at any time. On the general question we are considering, numerous authorities are cited in Cooley on Taxation, in the notes on pages 568-571. The case of *Powell v. Sup'rs of St. Croix Co.*, 46 Wis. 210, is an illustration of what constitutes a voluntary payment. It follows, from the views above expressed, that when the learned Circuit judge instructed the jury that unless, when the tax was paid, the sheriff had the present intention and purpose to seize the plaintiffs' goods then and there, the plaintiffs could not recover, and that an intention to seize at a future day was not sufficient, he laid down a limitation of the liability of the defendant which the law does not sanction.

For this error the judgment must be reversed, and the cause remanded for a new trial.

By the Court.— So ordered.

ALLEN V. CITY OF CHIPPEWA FALLS.

(32 Wis. 420.)

Municipal corporation — negligence — surface-water.

In grading streets and constructing gutters for surface-water, a city is not bound to provide for extraordinary storms, such as prudent persons do not think of guarding against.*

ACTION of damages for collecting and obstructing surface-water. The opinion shows the facts. The plaintiff had judgment below.

* See *Smith v. City Council of Alexandria* (33 Gratt. 208), 36 Am. Rep. 738; *Mayor of Americus v. Eldridge* (64 Ga. 594), 37 Am. Rep. 89.

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John J. Jenkins, for appellant.

Bingham & Pierce and *H. Richardson*, for respondents.

COLE, C. J. The counsel for the city insists that certain propositions of law, laid down in the charge of the court and in the instructions given, were erroneous, and calculated to mislead the jury as to the measure of the city's liability. After a careful examination of the charge, we think the point well taken. The first exception relied on is the one taken to that portion of the charge of the learned Circuit judge wherein the jury were instructed that if the evidence showed that the authorities of the city, by changing the grade of any of its streets, diverted water from the marshy ground mentioned in the case from its natural outlet, so as to make it run into the lots in question, without providing and maintaining sufficient sluiceways or gutters to carry it by the premises occupied by the plaintiffs, thereby causing injury to their building, this would be actionable negligence on the part of the city.

The criticism made on this charge is, that even if it is sound as an abstract proposition, it was not applicable to the facts proven on the trial. It is certainly true that all the testimony shows the plaintiff's building was destroyed by a violent and unusual storm of wind and rain, not by water diverted from the marshy ground, or any other source. It did appear from the evidence that north of Mill and west of Bridge street there was considerable low, swampy ground, where there were some springs; and that before the change in the surface of the land, caused by the erection of buildings and the laying out and grading of streets, the surface and spring water from this swampy ground passed off between Bridge and Bay streets south into the Chippewa river, in a different direction from the one it now flows in. But it was not this water which caused the damage, nor is the diversion thereof the grievance of which the plaintiffs complain; for really there is no ground for saying or claiming that the city, by changing a natural water-course, turned water upon the plaintiffs' building and destroyed it. Any remarks therefore applicable to such a state of facts were not pertinent, and might possibly tend to confuse or mislead a jury to the detriment of the city. It seems needless to observe that the city, under its charter, had the undoubted right to establish the grade of its streets, and in the execution of the grade the existing drainage of surface-water might be changed or destroyed.

In *Hoyt v. City of Hudson*, 41 Wis ; 105, s. c., 23 Am. Rep. 714, it was held, that where the passage of surface-water is obstructed by a city in grading and improving its streets, the owner of adjacent land injured by such obstruction cannot recover damages therefor. Chief Justice DIXON in that case reviews the authorities at considerable length, and reaches the conclusion that this is the better rule of law upon the subject. But that question is not necessarily involved here, inasmuch as the liability of the city is placed upon the ground, that in constructing and grading its streets, it carelessly and unlawfully failed to provide gutters, sewers and other means for carrying off safely, by the premises occupied by the plaintiffs, the large amount of water which would accumulate and empty into Central and Bridge streets in heavy rain-falls.

An exception was taken to an instruction, given at the request of the plaintiffs, which reads as follows: "No person or corporation has the right to increase the flow of surface-water by adding thereto water which does not originate from natural causes; and if the jury find, in this case, that the defendant, by means of the grading of streets or the construction of gutters in the said city, did add to the natural flow of water passing over the said streets, and made no suitable provision for the conducting such water away; and if, by reason of such accumulation of water, it escaped from said streets upon the plaintiffs' premises, and damage occurred to the plaintiffs thereby, — plaintiffs are entitled to recover, unless the jury shall find that the plaintiffs contributed by their negligence to such damage."

We are not certain that we fully comprehend the import of this instruction or the meaning intended to be conveyed. If it means that the city in grading its streets would have no right to collect and throw upon them water which would not otherwise have flowed or found its way upon the streets, without constructing gutters or making some suitable provision for conducting such water away so that adjacent property should not be injured by it, and that if the city failed to do this, and damage resulted therefrom, the city would be liable, we see no objection to the instruction. But the instruction seems to be obscure in its meaning, and difficult to be understood even by a lawyer. But as we are not certain that we understand it, we will make no further remarks upon it.

In our view, the most serious objection to the charge is, that it holds the city liable for the destruction of the building if it was

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occasioned by a rain-fall, however unusual or extraordinary, providing the gutters were insufficient to safely carry off the water. True, this proposition is not distinctly laid down in so many words, but it is the implication of the charge. Now the evidence shows that the storm which destroyed the building was one of wind, rain and hail of a most unusual and extraordinary character. Bridge and Central streets were covered with surface-water. One of the plaintiffs' witnesses says "there was water everywhere," and that, as the lightning flashed, he "looked up Bridge street, and could see it coming down just like a creek." Another of the plaintiffs' witnesses said "the streets were one sheet of water," and there is considerable testimony to the same effect, showing that the rain-fall and storm were most unusual and severe. Now, it seems to us to be carrying the doctrine of liability to a most unreasonable extent, to hold that the city was bound to provide gutters of sufficient capacity to carry off the surface-water which might accumulate and run down its streets in such an extraordinary freshet. If the city provides drains and gutters of sufficient size to carry off in safety the ordinary rain-fall, or the ordinary flow of surface water, occasioned by the storms which are liable to occur in this climate and country, it is all the law should require. The remarks of DENIO, C. J., in *Mills v. City of Brooklyn*, 32 N. Y., 489, 495, are so just and applicable to the present case, that I adopt them as giving my own views upon this question. "It is not the law," says that learned jurist, "that a municipal corporation is responsible in a private action for not providing sufficient sewerage for every or for any part of the city or village. The duty of draining the streets and avenues of a city or village is one requiring the exercise of deliberation, judgment and discretion. It cannot, in the nature of things, be so executed that in every single moment every square foot of the surface shall be perfectly protected against the consequence of water falling from the clouds upon it. This duty is not, in a technical sense, a judicial one, for it does not concern the administration of justice between citizens; out it is of a judicial nature, for it requires, as I have said, the same qualities of deliberation and judgment. It admits of a choice of means, and the determination of the order of time in which improvements shall be made. It involves, also, a variety of prudential considerations relating to the burdens which may be discreetly imposed at a given time, and the preference which one

locality may claim over another. If the owner of property may prosecute the corporation on the ground that sufficient sewerage has not been provided for his premises, all these questions must be determined by a jury; and thus the judgment which the law has committed to the city council, or to an administrative board, will have to be exercised by the judicial tribunal." So it might be said with reference to the question here, the duty of providing gutters of sufficient capacity and size to carry off the water falling from the clouds upon the streets, is one requiring the exercise of deliberation, judgment and discretion. Persons might well differ as to whether a gutter was ample to carry off all the water which would fall during a violent and excessive rain. If the city did provide gutters which were sufficient to conduct away in safety the rain-fall of ordinary storms—such freshets as usually occur in this climate,—it would seem to be all the law should require. The duty of providing against an extraordinary rain-fall or unusual freshet, such as does not occur but once in a series of years, which persons of ordinary prudence would not think of guarding against, is a burden which ought not to be imposed upon the city. Besides, there is another consideration which has weight. There was testimony which tended to show that the premises in question were low, and below the established grade. In reference to premises thus situated Judge DILLON, in his work on Municipal Corporations, says: "And even when the work of graduating the streets has been entered upon, there is not ordinarily, if ever, any liability to the adjoining owner arising merely from the non-action of the corporation in not providing means for keeping surface-waters from property situate below the established grade of the street. There are indeed cases which go further, and assert that there is no such liability, where, in making improvements upon streets or elsewhere, authorized by law, surface-waters are purposely turned from one's own land to that of another—from the street directly upon the adjacent property." Section 799.

The authorities cited in the notes fully bear out the doctrine of the text of the learned writer; but it is not necessary in this case to go to the extent of holding there would be no liability if it appeared that surface-water was purposely turned from the street on the plaintiff's property to its injury. In this case the Circuit judge, in one part of the charge, told the jury that a city was not required, in grading and improving the streets, to insure absolute safety to

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property-owners — that this might be impossible, — but was bound to use reasonable care and skill in doing its work ; but still the judge refused an instruction asked, that if the destruction of the building was occasioned directly by the storm, either by the wind, or by the rain and hail, or by all combined, the city would not be liable. In view of the testimony to which we have referred, we think the learned judge must have been of the opinion that the city would be liable for the loss, even though it was occasioned by an extraordinary rain-fall or an unusual freshet, such as a discreet and prudent person would not think of guarding against, and therefore refused the instruction. Indeed, we think the implication of the charge is, that the city would be responsible under such circumstances for not providing sufficient gutters to carry off the rain-fall. This was error.

Without noticing the other questions discussed, we think the judgment must be reversed, and a new trial ordered.

So ordered.

O'CONNOR V. FOND DU LAC, AMBOY & PEORIA RAILWAY CO.

(32 Wis. 526.)

Water and water-course — surface-water — obstructing artificial ditch.

A railway company, in the construction of its road, is not liable in damages for filling up an artificial ditch by which surface-water was drained from lands of an adjacent owner into a river.*

ACTION of damages for obstructing surface-water. The opinion states the point. The defendant had judgment below.

D. Babcock and R. M. Bashford, for appellant.

Geo. P. Knowles, for respondent.

COLE, C. J. The gravamen of the complaint is, as we interpret its allegations, that the defendant company, in making its road-

* See *Gibbs v. Williams* (25 Kans. 210), 37 Am. Rep. 241, and note, 248; *Shane v. Kansas City, etc., R. Co.* (71 Mo. 237), 36 Am. Rep. 490; *Cairo and Vincennes R. Co. v. Stevens*, ante, 330.

bed, filled up a ditch, which drained or carried the surface-water from the plaintiff's premises to the river. We do not understand that any stream of water or water-course proper was interrupted, crossed or changed by the company in building its road, though there is some language which would almost warrant such an inference. But the better, and as we think, true construction of the complaint is, that the action is brought for damages caused the plaintiff in consequence of the defendant filling up a drain by its road-bed in the vicinity of the plaintiff's land, "thereby preventing the free passage of the surface-water from her premises and the adjoining lands eastward to the river." Assuming this to be the cause of action intended to be stated, the question arises, does it show a legal injury? We are of the opinion that it does not. True, it is averred that the company, unmindful of its duty in that regard, wrongfully and negligently filled up a culvert which it first built in its road-bed, and thus stopped the flow of water through the ditch. But this only raises the question whether the defendant was bound to provide a way for the escape of mere surface-water from the plaintiff's premises. That question has already been settled in this State adversely to the claim of plaintiff.

In *Hoyt v. City of Hudson*, 27 Wis., 656; s. c., 22 Am. Rep. 714, it was in effect decided, that under the rule of the common law which exists here, an owner has the right to obstruct and hinder the flow of mere surface-water upon his land from the land of other proprietors; that he may even turn the same back upon or onto the land of his neighbor, without incurring liability for injuries caused by such obstructions. The same doctrine was laid down in *Pettigrew v. Village of Evansville*, 25 Wis., 223; s. c., 3 Am. Rep. 50, where the question is very fully considered; also in *Fryer v. Warne*, 29 Wis., 511. There is a discrepancy in the decisions of the different States upon this subject, because some follow the rule of the civil law, which gives a servitude on the lower in favor of the superior estate. But here the rule of the common law has been already adopted, and we see no good reason for changing it. According to that rule, no natural easement or servitude exists in favor of the owner of the higher ground for the flow of mere surface-water over the lower estate, but the owner of the latter may detain or divert the same without rendering himself liable in damages therefor. But this rule does not apply to a water-course, which implies a stream usually flowing in a definite channel, though it may

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at times be dry. *Eulrich v. Richter*, 37 Wis. 226. But a water-course does not include mere surface-water which is supplied by rains or melting snow flowing in a hollow or ravine on the land. *Hoyt v. Hudson*, *supra*.

We place our decision upon the distinct ground that the complaint fails to show that any natural water-course, properly speaking, has been obstructed or interfered with by the defendant. The company has only obstructed a ditch which drained or carried off surface-water from the plaintiff's premises. We do not think the defendant was bound to keep that ditch open on its own land for the convenience of the plaintiff; in other words, the owner of land is under no legal obligation to provide a way for the escape of mere surface-water coming on to his land from the land of his neighbor, but has the right to change the surface of the ground so as to interfere with or obstruct the flow of such water. "The obstruction of surface-water, or an alteration in the flow of it, affords no cause of action in behalf of a person who may suffer loss or detriment therefrom against one who does no act inconsistent with the due exercise of dominion over his own soil." BIGELOW, C. J., in *Gannon v. Hargadon*, 10 Allen, 106-110.

The learned counsel for the plaintiff argued the case upon the assumption that the complaint shows that a stream of water or natural water-course had been obstructed to the injury of his client; but we do not understand this to be the cause of action stated. It is quite clear that the company would have no right to obstruct a water-course or divert a stream of water so as to cause damage to another, without being responsible therefor. For an injury thus occasioned the company would surely be liable, upon general principles as well as by virtue of section 1836, R. S. That liability has often been enforced by the courts. *Young v. C. & N. W. Railway Co.*, 28 Wis. 171; *Lyon v. G. B. & Minn. Railroad Co.*, 42 Wis. 538; *Brown v. C. & S. Railroad Co.*, 12 N. Y. 486; *Hatch v. Vt. Cent. Railroad Co.*, 25 Vt. 49; *Lawrence v. Railway Co.*, 71 Eng. Com. Law, 643; *Hamden v. N. H. & N. Railroad Co.*, 27 Conn. 158. *Johnson v. A. & St. L. Railroad Co.*, 35 N. H. 569, are a few of the many cases which might be cited in support of that proposition of law. In *Waterman v. Conn. & Pass. Rivers Railroad Co.*, 30 Vt. 510, it was held "that a railroad company may, as a question of prudence and care, as well be required to have regard to the prevention of damage to a land-owner by the accumulation of surface-

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water merely, as of a running stream, when the geographical formation and surrounding circumstances are such as to make it apparent to reasonable men that such precautions are necessary; and that ordinarily what would be a reasonable performance of that duty under a given state of circumstances, would be a question of fact, and not a question of law for the court." P. 615.

But the facts stated do not bring the case within the doctrine of any of the above decisions. Here, it appears, there is low land adjacent to the plaintiff's premises, the surface-water from which was accustomed to flow through a ditch which was on another's land. That ditch the defendant has filled up in constructing its road-bed, and thereby turned this surface-water back upon plaintiff's premises, causing the injury complained of; that is, the surface of the land has been changed by the construction of the defendant's road-bed, which prevents the surface-water from passing off to the east to the river. This is the cause of action stated. No stream or water-course has been obstructed, as we construe the complaint. We therefore think the facts stated do not constitute a cause of action, and that the demurrer was properly sustained.

By the Court.—The order of the Circuit Court is affirmed.

Order affirmed.

WILL OF SMITH.

(52 Wis. 543.)

Will — capacity — spiritualism.

A belief in spiritualism does not of itself incapacitate to make a valid will.

SUFFICIENTLY reported in note, 36 Am. Rep. 426.

MARSHALL V. PINKHAM.

(52 Wis. 572.)

Trade-mark — family name.

The family name of a manufacturer cannot be made a trade-mark, so as to exclude other manufacturers of the same name from its use in the manufacture and sale of similar articles, unless unfair means are adopted to mislead purchasers into the belief that the article is of the other manufacture.*

* See *Shaver v. Shaver* (54 Iowa, 208), 37 Am. Rep. 194; *Oliver v. Bate*, ante, p. 73.

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ACTION by Charles H. Marshall and another to restrain defendant, who claims under a license from two of the children of Samuel Marshall, deceased, from manufacturing a liniment of the same kind sold by plaintiffs, or from vending such liniment with a label describing it as "Old Dr. S. Marshall's Celebrated Liniment," and containing other words and vignette, etc., it being alleged that plaintiffs have an exclusive right to manufacture such liniment, and to label as a trade-mark.

From about 1857 to 1870, when he died, Samuel Marshall of Fond Du Lac, Wisconsin, had a recipe for a liniment used for the cure of rheumatism and other diseases. This recipe was not discovered or invented by him, nor was it protected by a patent. He communicated it to the various members of a numerous family, among whom was his son, the plaintiff named, and the persons under whose license defendant acts, who were his daughters. Samuel Marshall permitted each of his family, for his or her own benefit to manufacture the article and sell it with a label attached furnished by Samuel Marshall, containing the words, "Old Dr. S. Marshall's Celebrated Liniment," and certain other words descriptive of the liniment, and a certain vignette of a horse's head, and with the address of the particular member of the family manufacturing the article, at the bottom of such label. Each member of the family engaged in such manufacture appears to have had, by their mutual agreement, some particular route or routes to which his sales were confined. After Samuel Marshall's death his widow continued for some years to manufacture the liniment, and to sell it (with said label attached) on the routes last occupied by him; and she then sold the material and paraphernalia of her business to the plaintiff, Charles H. Marshall. The defendant had judgment below.

Shepard & Shepard and *S. U. Pinney*, for appellants.

Geo. E. Sutherland, for respondent.

CASSODAY, J. A trade-mark performs a distinctive office. As such its use may be protected by the courts. But this does not authorize a monopoly upon fragments of the language, nor the exclusive appropriation of words in common use descriptive of common objects and qualities. It has often been decided that words

which are merely descriptive of the kind, nature, style, character or quality of the goods or articles sold, cannot be exclusively appropriated and protected as a trade-mark.

In *Caswell v. Davis*, 58 N. Y. 223; s. c., 17 Am. Rep. 233, it was held that "words or phrases in common use, and which indicate the character, kind, quality and composition of an article of manufacture, cannot be appropriated by the manufacturer exclusively to his own use as a trade-mark." Accordingly, where the plaintiffs prepared a medicine, the principal ingredients of which were iron, phosphorus and elixir of calisaya bark, to which they gave the name of "Ferro-Phosphorated Elixir of Calisaya Bark," and so labelled the bottles containing it, the court "held that this phrase could not be protected as a trade-mark." For the same reason it was held, in *Taylor v. Gillies*, 59 N. Y. 331; s. c., 17 Am. Rep. 333, that as the words "gold medal" indicated quality, and that in some competitive exhibition a gold medal had been awarded to the article for its excellence, the use of them could not be appropriated as a trade-mark. So it was held that "Lackawanna coal" was descriptive, and could not be appropriated as a trade-mark. *Canal Co. v. Clark*, 13 Wall. 311. See also *Perry v. Truefitt*, 6 Beav. 66; *Corwin v. Daly*, 7 Bos. 222; *Williams v. Johnson*, 2 id. 1; *Amoskeag Manuf'g Co. v. Spear*, 2 Sandf. 599; *Fetridge v. Wells*, 13 How. Pr. 387-8; *Partridge v. Menck*, 2 Barb. Ch. 101; *Popham v. Cole*, 66 N. Y. 69; s. c., 23 Am. Rep. 22. From these authorities it is evident that the words "Rheumatic Liniment," "Celebrated Liniment," and the other words in the label in question, descriptive of the liniment sold, could not be appropriated as a trade-mark.

It seems to be the office of a trade-mark to point out the true source, origin or ownership of the goods to which the mark is applied, or to point out and designate a dealer's place of business, distinguishing it from the business locality of other dealers. Such is substantially the rule laid down by many authorities. *Dunbar v. Glenn*, 42 Wis. 118; s. c., 24 Am. Rep. 395; *Gillott v. Esterbrook*, 48 N. Y. 374; s. c., 8 Am. Rep. 553; *Amoskeag Manuf'g Co. v. Spear*, 2 Sandf. 599; *Fetridge v. Wells*, 13 How. Pr. 385; *Barrows v. Knight*, 6 R. I. 434; *Tilley v. Fassett*, 44 Mo. 168; *Boardman v. Meriden Britannia Co.*, 35 Conn. 402. There are many cases holding this doctrine, but these and those above cited on the question of description, sufficiently indicate the rule. The words "Marshall's Liniment." "Marshall's Rheumatic Liniment," "Mar-

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shall's Celebrated Liniment," "Old Dr. S. Marshall's Celebrated Liniment," used in the various labels before us, could only therefore be protected as trade-marks in so far as they pointed out Marshall or old Dr. S. Marshall as the true originator or owner of the liniment to which they were attached. Of course, the address at the bottom of each label, by whomsoever used, indicated where and of whom the liniment could be obtained; and as it was sold almost wholly by being peddled out, no special mark or symbol was necessary or used to designate the dealer's place of business, distinguishing it from the business locality of other dealers, unless it was the vignette of the horse's head, which the plaintiffs never used and to which they make no claim. If the plaintiffs' label is entitled to the relief prayed for, it must be on the theory that they are entitled to the exclusive use of not only the word "Marshall's," but the words "Old Dr. Marshall's," as continuing to point out the true source, origin or ownership of the mixture, compound or liniment to which it was first applied by the father. True, old Samuel Marshall had a recipe of the mixture as early as 1857, but there is no pretense that he was the inventor, discoverer or originator of it. As stated, the father disclosed the secret to all his children, and each of them put it up, affixed the label in use, and sold or caused it to be sold for his or her own benefit, during the father's life-time, with his knowledge and in accordance with his often-expressed wish. Upon his death it would seem that such sales were continued by the widow and some of the children as before.

Can this court say, upon the facts of this case, that Charles H. had, prior to his father's death, by adoption and use acquired the exclusive right to the use of the word "Marshall's," or the words, "Old Dr. S. Marshall's," as a trade-mark upon the mixture so put up and sold by him, or by him and his wife? It must be remembered that the theory upon which actions for the infringement of a trade-mark are maintained, is that the law will not allow one person to sell his own goods as and for the goods of another. It is to prevent fraud and imposition upon the public, as well as the invasion of private rights. In *Singleton v. Bolton*, 3 Doug. 293, the plaintiff's father sold a medicine called "Dr. Johnson's Yellow Ointment." After his death, his son, the plaintiff, continued to sell the same medicine, marked the same way. The defendant also sold the same medicine, with the same mark upon it, and so the plaintiff brought the action for infringement, but was nonsuited.

A rule for a new trial was discharged by Lord MANSFIELD, who said: "If the defendant had sold a medicine of his own under the plaintiff's name or mark, that would be a fraud for which an action would lie. But here both the plaintiff and defendant used the name of the original inventor, and no evidence was given of the defendant having sold it as if prepared by the plaintiff. The only other ground on which the action could be maintained, was that of property in the plaintiff, which was not pretended, there being no patent, nor any letters of administration."

In *Canham v. Jones*, 2 Ves. & B. 218, it appears that one Swainson was for thirty years the sole proprietor of the secret or recipe for preparing the medicine called "Velno's Vegetable Syrup," which he had purchased for £6,000, and by his will bequeathed the same to the plaintiff, who, after the testator's death, continued to make and sell the same preparation as specified by the recipe. The defendant had been employed in preparing the syrup for Swainson, but never knew the complete composition, as Swainson always added other essential ingredients; but after his death the defendant made at his residence and sold a medicine under the name of "Velno's Vegetable Syrup," and represented that it was precisely the same as that made and sold by the late Mr. Swainson. On demurrer it was held that the bill could not be maintained. PLUMER, V. C., said: "The bill proceeds upon an erroneous notion of exclusive property now subsisting in this medicine, which Swainson, having purchased, had a right to dispose of by his will, and as it is contended, to give the plaintiff the exclusive right of sale. If this claim of monopoly can be maintained, without any limitation of time, it is a much better right than that of a patent." The court then goes on to state that the case did not come within the class of cases "in which the court had restrained a fraudulent attempt by one man to invade another's property," nor where one appropriates to himself the benefit of another's good will, nor of one person falsely representing himself to be another, or his trade or production to be the same as another, thus combining imposition on the public with injury to the individual. The vice-chancellor, in closing, said: "The defendant does not hold himself out as the representative of Swainson, setting up a right in that character to the medicine purchased by him, but merely represents that he sells, not the plaintiff's medicine, but one of as good a quality. He is perfectly at liberty to do so. If any exclusive right in this medicine ever existed, it has long expired."

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In *Leather Cloth Co. v. American Leather Cloth Co.*, 11 Jur. N. S. 513, Lord CRANWORTH, among other things, said: "Difficulties however may arise where the trademark consists merely of the name of the manufacturer. When he dies, those who succeed him (grandchildren, or married daughters, for instance), though they may not bear the same name, yet ordinarily continue to use the original name as a trade-mark; and they would be protected against any infringement of the exclusive right to that mark. They would be so protected, because, according to the ways of the trade, they would be understood as meaning no more by the use of their grandfather's or father's name, than that they were carrying on the manufacture formerly carried on by him. Nor would the case be necessarily different, if instead of passing into other hands by devolution of law, the manufactory were sold and assigned to a purchaser. The question in every such case must be, whether the purchaser, in continuing the use of the original trade-mark, would, according to the ordinary usages of trade, be understood as saying more than that he was carrying on the same business as had been formerly carried on by the person whose name constituted the trade-mark." P. 516.

The case before us differs from most cases in the fact that the name of the father had, for many years during his life, been attached to this mixture or liniment, whether put up and peddled out by his children or himself, and that it was the reputation of the liniment acquired by such peddling, instead of a particular place of trade, which gave it whatever value it had. Upon the authorities cited it would seem to be very certain that Charles H. never acquired an exclusive right to the use of the word "Marshall's" or "Old Dr. S. Marshall's," upon the liniment put up by him, as against his father, mother, brothers or sisters. If the plaintiff Charles H. never acquired any such exclusive right as against them, it would seem quite doubtful whether he ever acquired it as against any one. By such diffusive use it may be that the word "Marshall's" had ceased to perform the office of a trade-mark, as above defined, if it ever in fact had that office. A trade-mark is to prevent fraud and imposition, not to inaugurate and perpetuate them. If old Samuel Marshall, surreptitiously or by favor of another, obtained the secret or recipe, and made up the mixture and sold it as "Marshall's Liniment," thus representing that he was the inventor or originator of the mixture when in fact it was discovered by another, it would seem to have been an imposition upon the public in its inception.

Should such imposition be regarded as condoned by Samuel Marshall's long-continued use, and by his establishing for it a good reputation on account of its virtues and healing properties, yet it may be doubtful whether it would, as against the public, survive the appropriation and use by each member of his numerous family, and be protected as the trade-mark of each, a decade after his death. The question occurs, whom does the word "Marshall's" point out as the true source, origin or owner of the original genuine mixture. or what particular place of business or sale has it designated during these many years? If it never in fact truly so pointed out or designated, or if by its distributive use, or by the change from "Marshall's" to "Old Dr. S. Marshall's," it ceased to perform that function, then it can no longer be protected as a trade-mark.

In *Burgess v. Burgess*, 17 Eng. L. & E. 257, John Burgess, the father of the plaintiff, had for some years manufactured and sold, at No. 107 Strand, "a fish sauce," under the name of "Burgess's Essence of Anchovies." Then he took the plaintiff, his son William R., into partnership, and continued the business under the firm name of "John Burgess & Son," selling the same article under the same name. John died, and the plaintiff, William R., continued the business at the same place, in the name of the old firm, selling the same article under the same name, and employed the defendant, his son William H., on a salary in the business. Subsequently a difficulty arose between father and son, and the latter left the service of the former, and went into business for himself at another place, and commenced selling the same kind of fish sauce under the same name of "Burgess's Essence of Anchovies," at what he advertised as "Burgess's Fish Sauce Warehouse, late of 107 Strand," but at a lower price; and the bill charged that the sales were made as and for the article manufactured and sold by the plaintiff, and to deceive and defraud the plaintiff and the public. The vice-chancellor granted the injunction stopping the defendant, in so far as his advertisement indicated that he was the same man, and conducting the same business, as "late of 107 Strand," but refused to restrain him from manufacturing and selling "fish sauce" under the name of "Burgess's Essence of Anchovies;" and the appeal therefrom was dismissed. In giving the opinion of the court, KNIGHT BRUCE, L. J., said: "All the queen's subjects have a right, if they will, to manufacture and sell pickles and sauces, and not the less that their fathers have done so before them. All the

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queen's subjects have a right to sell them in their own name, and not the less so that they bear the same name as their father; and nothing else has been done in that which is the question before us * * * He (the defendant) carries on business under his own name, and sells essence of anchovy as 'Burgess's Essence of Anchovy,' which it is. * * * The only ground of complaint is the great celebrity which, during many years, has been possessed by the elder Mr. Burgess' essence of anchovy. That does not give him such exclusive right, such a monopoly, such a privilege, as to prevent any man from making essence of anchovy, and selling it under his own name." s. c., 17 Jurist, 292.

In *James v. James*, L. R., 13 Eq. Cas. 421, it was held, per Lord ROMILLY, M. R., that "any person who has, without the use of unfair means, become acquainted with the mode of compounding a secret, unpatented preparation, may, after the death of the original discoverer, make and sell the compound, describing it by the name of the discoverer, provided he does not lead the public to suppose that his preparation is the manufacture of the successors in business of the original discoverer; but he must not assert that his is the only genuine article, or suggest that the article manufactured by the successors of the original discoverer is spurious." s. c., 2 Eng. 365.

In *Massam v. Thorley's C. F. Co.*, 6 Ch. Div. 574, it was held, per MALINS, V. C., that "any person who has become acquainted with the process of manufacturing an article which is in general secret, is entitled to manufacture it; and if the name of the first manufacturer has become attached to the article, any person afterward manufacturing is entitled to describe it by the name of such original manufacturer; and if he happens to be of the same name as the original manufacturer, he may use his name in describing his business, or allow it to be used by a company formed by him for the purpose of carrying on the business, notwithstanding that the representatives of the original manufacturer continue to carry on the old manufacture under the old name." s. c., 23 Eng. 175.

In *Meneely v. Meneely*, 62 N. Y. 427; s. c., 20 Am. Rep. 489, it was held that "a person cannot make a trade-mark of his own name, and thus debar others having the same name from using it in their business. Every man has the absolute right to use his own name in his own business, even though he may thereby interfere with and injure the business of another bearing the same name,

provided he does not resort to any artifice or do any act calculated to mislead the public as to the identity of the establishments, and to produce injury to the other beyond that which results from the similarity of the names." To the same effect are *Gilman v. Hunnewell*, 122 Mass. 139; *Carmichel v. Latimer*, 11 R. I. 395; s. c., 23 Am. Rep. 481.

In *Lea v. Deakin*, 18 Am. Law. Reg. 322, Judge DRUMMOND, refused to restrain the application of the word "Worcestershire" to sauce, on the ground that the name had become generic, and that persons residing at a place of that name in England, and who there manufactured the sauce and sold it by that name, did not thereby acquire the exclusive use of the same as a trade-mark.

In *Cheavin v. Walker*, 5 Ch. Div., 850; s. c., 22 Eng. 513, S. Cheavin and his son, G. Cheavin, manufactured and sold filters, which had been patented by the father S. C., under the title and marked with the label as "S. Cheavin's Improved Patent Gold Medal Self-Cleaning Rapid Water Filters." After the father died, and the patent having expired, G. C. substituted his name in the place of his father's, and continued the manufacture and sale under the same name so modified, above which was a medallion containing the royal arms, surmounted by the words "By Her Majesty's Royal Letters-Patent." The defendant left the employ of G. C., and began manufacturing and selling in the same town for himself filters similar in appearance to G. C.'s, and inscribed with "S. C.'s Patent Prize Medal Self-Cleaning Rapid Water Filters; Improved and Manufactured by Walker, Brightman & Co.;" and it was held by the Court of Appeal, reversing the vice-chancellor's decision—"First, that the label used by the plaintiff was not a trade-mark, but only a description of the article as made according to S. C.'s patent, which was common to all the public; secondly, that there was nothing in the defendant's label calculated to mislead the public by a fraudulent imitation of the plaintiff's label; thirdly, that the plaintiff's label, coupled with the medallion of the royal arms, constituted a false representation that the patent was still subsisting, and disentitled the plaintiff to relief by injunction."

In *Singer Manufg Co. v. Wilson*, 2 Ch. Div. 434; s. c., 16 Eng. 826, it was held, in effect, on appeal, affirming the decree of the master of the rolls dismissing the bill, that "when a manufacturer, A. (Singer), has acquired a reputation in the market, so that the

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goods made by him are commonly known by his name, but is not possessed of any patent, a rival manufacturer, B. (Wilson), being entitled to imitate A.'s goods, is entitled also, provided that he does not place A.'s name on his own goods, to advertise his goods and offer them for sale by the name of A. (Singer), if he takes care to state clearly at the same time that the goods which he sells are manufactured by himself. That case was subsequently reversed in the House of Lords, but without prejudice to any question in the case, in the event of further evidence being given, which was thereby authorized. 3 App. Cas. 376; s. c., 24 Eng. 272. The syllabus of the case may seem to be in conflict with some of the cases cited, but it was really reversed on account of the irregularity of the proceedings, and because it was not essential for the plaintiffs to prove actual intent to deceive purchasers to make out a *prima facie* case; but that if the defendant's advertisements were calculated to mislead an unwary purchaser of the machines into the belief that he was purchasing those manufactured and sold by the plaintiffs, then they were *prima facie* entitled to an injunction; and all other questions were expressly reserved by the lord chancellor until further evidence should be adduced.

Applying the rules governing the authorities cited to the case at bar, we are forced to conclude that any citizen had a perfect right to manufacture and sell the mixture or liniment formerly manufactured and sold by old Samuel Marshall. It is equally clear that any of the Marshall children, or any other person by the name of Marshall, having acquired a knowledge of the compound, had a perfect right to manufacture and sell it, by himself or others, in his own name, even against the protest of old Samuel Marshall, provided he did not do it in such way as to be likely to mislead ordinary purchasers, proceeding with ordinary caution, into the belief that they were purchasing the liniment manufactured and sold by old Samuel Marshall himself. If this could be rightfully done, contrary to his wish and against his protest, it most certainly could be done by his children, as it was, with his expressed approbation. If such right to manufacture and sell existed as against old Samuel Marshall himself, then it most certainly did as against any one of his children. If none of his children could, in the case supposed, be restrained by the father during his life, it is equally certain that they could not be restrained by another, or even his representative, after his

death. It would also seem to follow, from the cases cited, that on the death of old Samuel Marshall (assuming that no one succeeded to the good will of his business), any citizen would have the legal right to manufacture liniment composed of the same ingredients and made in the same way as he manufactured that sold by him, and also, in making sales, to describe it as such. Upon that assumption the words "Old Dr. S. Marshall's Celebrated Liniment" were merely descriptive of the compound, and if truthfully applied by the defendant in making sales, no one could rightfully complain, as no one had any patent upon it or exclusive right to the use of any words which aptly described it. Upon his death, with no successor to the good-will of his business, those words would cease to indicate origin or ownership, and hence cease to be a trade-mark.

There is no pretense that old Samuel Marshall ever in the manufacture and sale of this liniment, perpetrated any actual or constructive fraud or deceit upon the business of *Charles H.*, but on the contrary, Exhibit B, which *Charles H.* testified that he never used, and which it appears that the father, and other children under his authority, did use, closes with these words: "N. B. Dr. Marshall will hold himself responsible for the genuineness of no preparation which does not bear his own trade-mark of the horse's head." From this it would naturally be inferred, that in the opinion of the father, *Charles H.* was not selling the genuine mixture; but the fact that *Charles H.* knew the formula or recipe would seem to indicate that he did sell the same compound. That postscript or notice does not seem to have been used by the defendant or any of the children after the death of the father. There is nothing in the finding, and there seems to be no evidence, which would warrant us in holding that the defendant did any thing in advertising or selling his mixture to lead the public to suppose that he was the successor of old Samuel Marshall, or that his was the only genuine article, or that the plaintiffs' mixture was spurious, or that he was selling the same as and for the liniment manufactured by the plaintiffs; and without some of these things being done there would seem to be no ground for an injunction, within the doctrine of the above authorities.

Again, the long delay of *Charles H.* to assert an exclusive right to use the words "Old Dr. S. Marshall's Celebrated Liniment," would of itself, on a proper showing, seem to be an impediment to

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his protection in the exclusive use of them. *Beard v. Turner*, 13 L. T. R. 746; *Flavell v. Harrison*, 19 Eng. L. & Eq. 15; *Lea v. Deakin*, 18 Am. Law. Reg. 322.

There is still another view of this case deserving notice. There is no claim that old Samuel Marshall, much less Charles H., actually discovered or invented the mixture or compound. There is no pretense that either had the exclusive right, during the life of the father, to manufacture and sell it under the name of "Marshall's Rheumatic Liniment," or "Old Dr. S. Marshall's Celebrated Liniment." These facts being admitted, it would seem to be at least extremely doubtful whether Charles H. ever acquired the exclusive right to their use as a trade-mark; and if such exclusive right was doubtful, it would seem to be contrary to the practice in equity to grant an injunction in the first instance.

In *Farina v. Silverlock*, 6 De Gex, M. & G., 214, it was held by Lord Chancellor CRANWORTH, that "in a case where the mark consisted of a label in a certain form, and it was shown that in very many instances labels the same as or similar to it might be sold for a legitimate purpose, the court, in the absence of any proof of actual fraud, refused to restrain the printing and sale of such labels until the manufacturer, who alleged that they were used for a fraudulent purpose, had established his case by an action at law."

In *Spottiswoode v. Clark*, 10 Jur. 1043, it was held by the lord chancellor, on a bill to restrain the defendant from selling a mark alleged to be a fraudulent imitation of the plaintiffs', "that it not being perfectly clear that the plaintiff had a legal right, the injunction prayed by the bill ought not to be granted." This is especially the rule where the plaintiff is himself seeking to deceive the public. *Pidding v. Howe*, 8 Sim. 477; *Molloy v. Downman*, 3 Myl. & Cr. 1; *Clark v. Freeman*, 11 Beav. 112; *Flavell v. Harrison*, 19 Eng. L. & Eq. 15; *Perry v. Truefitt*, 6 Beav. 66. Mr. Browne tersely states the true rule when he says: "The right to the use of a trade-mark must be exclusive of all other persons. A trade-mark is an emblem of a man just as much as his written signature, and is used to denote that an article of merchandise has been made by a certain person, or that it has been sold or offered for sale by him. If the same mark were to be used by different persons for the same species of goods, it would lead to inextricable confusion; and its true and only legitimate purpose would be over-turned, for then it would lack the essential element of an indica

tion of origin or ownership." Section 303. From this it would seem that Charles H. never had in himself any such exclusive right in the words in question as would authorize a court of equity to restrain others from using the same *bona fide* in the sale of their own goods, and without the tendency to deceive. The only remaining question is, whether the wife of Charles H. got such exclusive right by way of the alleged purchase from the mother, and the discovery after her death of the existence of a lost will left by the father, and the establishment of it as such, and the admitting of it to probate. As suggested on the argument, neither the mother, Mary J., nor the plaintiff, Mary W., could get any title to the personal property, business, and good-will of the business of old Samuel Marshall, except through an administration upon his estate, and an order of distribution; and as no order of distribution was ever made, nor administrator or administratrix was ever appointed, it follows that the plaintiff Mary W. got nothing through the alleged purchase. *Murphy v. Hanrahan*, 50 Wis. 485. To the same effect is *Singleton v. Bolton*, *supra*. As no exclusive right of either of the plaintiffs was invaded, they were not entitled to an injunction by reason of any mere absence of such right on the part of the defendant.

By the Court. The judgment of the Circuit Court is affirmed.

Judgment affirmed.

LAVERY V. CROOKE.

(32 Wis. 612.)

Seduction — loss of service — damages — evidence — force.

A father may maintain an action for the seduction of his minor daughter while in the defendant's service if he retained the right to receive her services. Exemplary damages are proper. Evidence of the defendant's pecuniary condition is competent.* The fact that the sexual intercourse was procured by force does not take away the right of action.

ACTION by father for seduction of his daughter, Katie. The opinion states the facts. The plaintiff had judgment below.

* To same effect, *Clem v. Holmes* (33 Gratt. 722), 36 Am. Rep. 758.

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E. P. Smith, A. Scott Sloan and W. J. McElroy, for appellant.

A. G. Cook and H. W. Lander, for respondent.

CASSODAY, J. [Omitting minor matters.] It is urged by counsel that there was no evidence tending to show that Katie was in the service of her father at the time of the intercourse. She was at that time only fifteen years of age. There is no pretense that the defendant had any right to her services, or to detain her from her father against his wish. She was merely stopping with the defendant and his wife, at their request and for their pleasure, at a time when she was not needed by her father and mother, as she had done from time to time during the three years previous. There is evidence that she worked at her father's when at home. We have carefully examined the several authorities cited by the learned counsel to show that Katie was not at the time of the intercourse the servant of the plaintiff. In most of them the daughter was of age and under contract of service to another.

In *Grinnell v. Wells*, 7 M. & G. 1033, the daughter had permanently left her father, with no intention of returning, and there was no pretense of loss of service alleged or proved. TINDALL, C. J., said: "The declaration in this case contains no allegation of the loss of the service of the daughter."

In *Carr v. Clarke*, 2 Chitty, 260, the father had moved away from his former home, leaving his daughter, who was under age, in the service of another; and a nonsuit was granted on the ground that there was no evidence tending to show an intention to return to the father. BAYLEY, J., said: "The cases go upon the express ground that the relation of master and servant must exist, but the evidence may be very slight. The parties must stand in the relation of master and servant, although a temporary absence may not be sufficient to destroy that relation."

In *Bartley v. Richtmyer*, 4: N. Y. 38, a step-father sought to recover on account of intercourse with his step-daughter, about nineteen years of age, and who had left his house about two years before with no intention of returning; and it was held, in an able opinion by BRONSON, C. J., that "the action for seduction is founded on the loss of service, and in order to maintain it there must be an actual or constructive relation of master and servant. And in order to constitute the constructive relation, the master

must have the right to command the services of the female at his pleasure. The relation exists constructively between a father and infant daughter, although the latter is actually in the service of another, provided the former has a right to reclaim her services at any time. But a step-father is not, as such, entitled to the services of his step-daughter, and is not liable for her support."

In *White v. Nellis*, 31 N. Y. 405, cited by counsel for the defendant, a verdict for the father was sustained. DAVIS, J., giving the opinion of the court, said: "This action is not maintainable upon the relation of parent and child, but solely upon that of master and servant. The latter relation existed in this case, because the debauched girl was the minor child of the plaintiff, and although living at the time of the seduction with the defendant, the father might have commanded her services at pleasure." Page 407. This seems to be a correct statement of the law, and it is abundantly supported by authority. *Martin v. Payne*, 9 Johns. 387; 6 Am. Dec. 288; *Clark v. Fitch*, 2 Wend. 459; 20 Am. Dec. 639; *Mulvehall v. Millward*, 11 N. Y. 343; *Furman v. Van Sise*, 56 id. 435; s. c., 15 Am. Rep. 441; *Hornkelh v. Barr*, 8 S. & R. 36; *Kennedy v. Shea*, 110 Mass. 147; s. c., 14 Am. Rep. 584; *Blagge v. Ilsley*, 127 Mass. 191; s. c., 34 Am. Rep. 361; *White v. Murland*, 71 Ill. 250; s. c., 22 Am. Rep. 100; *Griffiths v. Teelgen*, 28 Eng. L. & Eq. 371. In the case last cited, the minor daughter, with the consent of her father, went and worked for the defendant a month during the absence of his wife, for which he agreed to pay her something, and he did; but the father recovered.

In *Martin v. Payne*, the minor daughter, with her father's consent, went to live with her uncle, for whom she worked when she pleased, under an agreement that he should pay her for her work, but there was no agreement as to her remaining any definite time; and it was held that the father could recover, notwithstanding she had no intention of returning to her father's had not the misfortune happened. SPENCER, J., said: "She was his servant *de jure*, though not *de facto*, at the time of the injury; and being his servant *de jure*, the defendant has done an act which has deprived the father of his daughter's services, which he might have exacted but for that injury." Page 390.

In *Clark v. Fitch*, it was held that the father might maintain the action, although the minor daughter had left her father with his consent, and was *de facto* the servant of another at the time of the

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injury, and he had relinquished all claim to her services and incurred no expense, as he might at pleasure revoke such license, recall his daughter, and control her services.

In *Mulvehall v. Millward*, the minor daughter left her father's and was injured while in the employ of the defendant, where she remained until after her confinement and recovery, and there was no proof that her father took care of or expended any thing on her account during her sickness ; but it was held that he could recover.

In *Furman v. Van Sise*, it was held that a widowed mother could recover, although her minor daughter was at the time of the injury at work for the father of the defendant for wages, to be applied to her own use, under an agreement with the mother. The other cases cited all go to the extent of holding that the father could recover if he had not parted with the right to control his minor daughter's service.

Here the question of service was fairly submitted to the jury, upon the principle of the authorities cited, and there was sufficient evidence to sustain the verdict in this respect.

It is urged by the counsel for the defendant that the charge left the jury free to find punitive damages, whereas they should have been confined to compensatory damages.

In *Klopper v. Bromme*, 26 Wis. 372, the right of punitive damages in such a case does not seem to have been questioned. In *Bass v. C. & N. W. Railway Co.*, it was held that punitive damages might be allowed to the plaintiff for being put out of a ladies' car by a brakeman on the defendant's train, and \$2,000 assessed as such damages were sustained. 42 Wis. 754 ; s. c., 24 Am. Rep. 437 ; s. c., 39 Wis. 450 ; s. c., 17 Am. Rep. 495.

Edmondson v. Machell, 2 T. R. 4, was an action for loss of services by reason of an assault and battery to a servant, and the action was likened by the trial judge, in his charge to the jury, to an action by a father for deflowering his daughter, in which large damages had often been given, and that upon the whole case the jury had a right to give such damages as they thought just, considering the situation and circumstances of the defendant ; and they returned a verdict of £300, which was sustained by the Court of King's Bench. This case was approved by Lord ELLENBOROUGH, C. J., in *Irwin v. Dearman*, 11 East, 23. *Tullidge v. Wade*, 3 Wils. 18, was an action by a father for loss of service of his daughter by reason of seduction, and Lord Chief Justice WILMOT, with whom

the other judges concurred in refusing a new trial after verdict for the plaintiff, said : " Actions of this sort are brought for example's sake ; and although the plaintiff's loss in this case may not really amount to the value of twenty shillings, yet the jury had done right in giving liberal damages." In that case the daughter was thirty years of age.

Bedford v. McKoul, 3 Esp. 119, was an action by a mother for the loss of service of her daughter by reason of her seduction, tried before Lord ELDON, just before his appointment as lord chancellor ; and among other things, he said : " In such case I am of opinion that the jury may take into their consideration all that she [the mother] can feel from the nature of the loss. They may look upon her as a parent losing the comfort as well as the service of her daughter, in whose virtue she can feel no consolation, and as the parent of other children, whose morals may be corrupted by her example."

Andrews v. Askey, 8 C. & P. 7, was an action by a widow for the seduction of her daughter, and TINDAL, C. J., *inter alia*, said : " You are not confined to the consideration of the mere loss of service, but may give some damages for the distress and anxiety of mind which the mother has felt. If you find for the plaintiff, you will take into consideration the *situation* in life of the *parties*, and say what you think, under all the circumstances of the case, is a reasonable compensation to be given to the mother." See *Bennett v. Allcott*, 2 T. R. 167 ; *Berry v. DaCosta*, L. R., 1 C. P., 331.

In *Ingersoll v. Jones*, 5 Barb. 661, an action was brought for loss of service of an adopted daughter and servant, and on motion for a new trial the court, per SILL, J., said : " Exemplary damages may always be allowed in this kind of actions, in the discretion of the jury. For seduction the servant has no action. This distinction is noticed in the case cited by the defendant's counsel, 24 Wend. 424; 4 Denio, 461; and the propriety of allowing exemplary damages to be recovered in an action like this is there conceded." Pages 664-5.

Knight v. Wilcox, 18 Barb. 212, was an action for loss of service by reason of the seduction of a daughter, and it was held, per STRONG, J., that " it was proper for the judge to charge that on the question of damages the jury may taken into view the wounded feelings of the plaintiff, and may not only recompense him, but punish the defendant according to the aggravation of his offense.

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A father may recover vindictive damages for the seduction of his daughter." That case was subsequently reversed in the Court of Appeals on the ground that there was no sufficient proof of service; but the question of punitive damages was not considered. 14 N. Y. 413.

In *Badgley v. Decker*, 44 Barb. 577, the daughter was twenty-five years of age, and it was held that "the plaintiff is not restricted to compensatory damages; and it is not erroneous for the judge to charge the jury, that in estimating the amount, they may take into consideration the wounded feelings of the plaintiff and the disgrace to the family." This ruling was based upon the decision in *Knight v. Wilcox*, 18 Barb. 212.

In *Damon v. Moore*, 5 Lans. 454, it was held at General Term, per PORTER, J., that it was not error to sustain a verdict giving the mother exemplary as well as compensatory damages (\$1,500) for loss of service on account of the defendant having debauched and carnally known her daughter and servant, whether the action was in the form of trespass or case, or brought about by seduction or force.

In *Lipe v. Eisenlerd*, 32 N. Y. 229, the daughter was twenty-nine years of age, and the father obtained a verdict of \$1,000, and the judgment thereon was affirmed at General Term, and in the Court of Appeals, where it was held that "the plaintiff is not limited in his recovery to mere compensatory damages, but may recover exemplary damages when he is so connected with the party as to be capable of receiving injury through her dishonor."

In *Applegate v. Ruble*, 2 A. K. Marsh. 128, a verdict in such case for \$1,800, including exemplary damages, was sustained.

Fox v. Stevens, 13 Minn. 272, was a case of this kind; and McMILLAN, J., in speaking for the court, said: "In cases of willful wrongs it is settled by authority that exemplary damages may be given. * * * We see no reason why this case does not come within the rule." Page 277.

Phelin v. Kendordine, 20 Penn. St. 354, was a case like this; and LEWIS, J., speaking for the court, said: "Although the action by a parent for the seduction of his daughter has its technical foundation in the loss of his daughter's services, it is well settled that proof of the relation of master and servant, and of the loss of service by means of the wrongful act of the defendant, has relation only to the form of the remedy, and that the action being sustained in point of

form by the introduction of these technical elements, the damages may be given as a compensation to the plaintiff, not only for the loss of service, but also for all that the plaintiff can feel from the nature of the injury." Page 361. He also approvingly adopts the following language from the Supreme Court of the United States, as applicable to that case: "In actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive or vindictive damages upon the defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff." *Id.* See *Day v. Woodworth*, 13 How. 371.

It is true there are but few reported cases where the jury were directly charged, as here, that they might not only compensate the plaintiff, "but punish the defendant according to the aggravation of the offense;" but we are to remember that courts have almost uniformly treated the case rather as an anomaly. While the loss of service is the gist of the action, and essential to maintain it, yet we are not aware of any reported case brought by a parent where the value of such services was held to be the measure of the damages. On the contrary, the feelings of the parent, the dishonor of himself and family, and the example to his other children, have been regarded by all courts as the important elements making up substantial damages in connection with the slight pecuniary loss. The action is grounded in tort, and necessarily willful, and we see no reason why punitive damages may not be allowed to a parent for such injury so intentionally inflicted upon him and his family. The language used in the charge as to punitive damages may not be sufficiently guarded, but if the defendant desired to have the instruction more specific, he should have so requested. This he did not do, but seemed to think that the plaintiff had no right to exemplary or punitive damages, and accordingly requested the court to so instruct, which was contrary to our view of the law.

This also disposes of the objection to the evidence as to the defendant's pecuniary circumstances. It was just that kind of evidence that was held properly admissible in *Applegate v. Rubel*, *supra*, and a verdict for one-tenth the amount of the defendant's property was sustained. So also *White v. Murtland*, *infra*. Courts are liberal in such case to allow evidence to show the circumstances and conduct of the respective parties, not only at the time of the alleged injury, but before and after, as bearing upon the question of damage. *Klopfers v. Bromme*, 26 Wis. 372; *Hewitt v. Prime*, 21 Wend.

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79; *Davidson v. Goodal*, 18 N. H. 423; *White v. Murtland*, 71 Ill. 250; s. c., 22 Am. Rep. 100; *Blagge v. Ilsley*, 127 Mass. 191; s. c., 34 Am. Rep. 361; *Kennedy v. Shea*, 110 Mass. 147; s. c., 14 Am. Rep. 584.

The counsel insists that the court should have instructed the jury, as requested, that if the wrongful connection was the result of rape, then the action could not be maintained. The judge submitted the case to the jury on the theory that plaintiff could recover only on the ground of seduction, "and without such force as would amount to rape," and then defined the meaning of rape.

In *Kennedy v. Shea*, *supra*, it was held that "it is no objection to the maintenance of an action for seducing the plaintiff's daughter, that the sexual intercourse between the daughter and defendant was had by force." See also *Damon v. Moore*, *supra*.

By the Court.—The judgment of the Circuit Court is affirmed.

Judgment affirmed.

Motion for rehearing denied.

RESSEQUIE V. BYERS.

(53 Wis. 650.)

Former adjudication — bar.

A judgment of a justice's court, in favor of a physician for professional services, is not a bar to an action by the defendant therein against the plaintiff therein for mal-practice in respect to the same services, that question not having been litigated in the justice's court. (*See note, p. 778.*)

ACTION of damages for mal-practice. The defendant set up in bar a judgment recovered by him for the same services, in a justice's court, upon default. The defendant had judgment below.

P. J. Clawson, for appellant.

A. S. Douglas, for respondent.

COLE, C. J. There is undoubtedly high authority which supports the ruling of the learned Circuit Court. There are cases which distinctly hold that a judgment in a justice's court in favor of a

physician or surgeon for professional services is a bar to any action by the defendant therein against such physician or surgeon for malpractice in rendering such services. *Gates v. Preston*, 41 N. Y. 113; *Blair v. Bartlett*, 75 id. 150; s. c., 31 Am. Rep. 455; *Bellinger v. Craigie*, 31 Barb. 534. There is however some conflict of authority on this subject; and as the question is now presented to this court for the first time, we feel at liberty to adopt a rule which seems to us founded on sound principle, and most in accord with reason and convenience in practice. The courts in New York in effect say that the question of the proper care and skill on the part of the physician or surgeon is one necessarily involved and adjudicated upon in an action by him to recover compensation for his services rendered; therefore a judgment in his favor should estop the parties to such suit from ever after questioning that fact in any other action. And the courts of that State even apply the rule to a case where, though the defendant at first appeared in the justice's court and put in an answer, yet he afterward withdrew it, and did not contest the plaintiff's claim; and the judgment was held to be a bar to a subsequent action by him against the physician for malpractice. *Blair v. Bartlett*, *supra*. But the doctrine of the New York courts has not escaped criticism.

Mr. Bigelow, in his learned work on Estoppel (2d ed.), p. 98 *et seq.*, reviews these decisions, as well as the adjudications of other courts in strictly analogous cases, and questions the soundness of the New York rule, "unless the distinction taken in New Hampshire, between a judgment by confession and one by default or on trial without alleging the defense, be correct." Page 107. "It may sometimes be difficult to draw a line of distinction between a judgment which will operate as a bar to an action for a specific claim, and one which leaves the claim outstanding to be enforced by a cross-action" (CHURCH, C. J., in *Dunham v. Bower*, 77 N. Y. 76; s. c., 33 Am. Rep. 570); but where as in this case, the defendant makes default in a justice's court, and does not even attempt to contest the value of the services rendered or raise the question of their proper performance, it is more difficult to perceive any solid ground for holding that he is concluded from showing, in another action, that the plaintiff in that case was guilty of negligence in his professional treatment. It was certainly not necessary, in order to entitle the plaintiff in the justice's court to a judgment, that he should prove he was not guilty of any negligence. "It was enough

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to show simply that he performed the services at the defendant's request and their value, and the fact that the amount was due." HAGANS, J., *Sykes v. Bonner*, 1 Cin. Sup. Ct. Rep. 464. It is very doubtful whether the defendant, in the action before the justice under his answer, could have shown that the plaintiff was guilty of malpractice (*Crawford v. Earl*, 38 Wis. 312); certainly he did not attempt to raise that issue, or litigate any such question. And if this action is barred by the recovery in the justice's court, it is because the question as to the care and skill of the defendant herein was involved by implication in that suit, not because any such fact or issue was actually litigated between the parties.

This court has said that a judgment is conclusive upon the parties thereto only in respect to the grounds covered by it, and the law and facts necessary to uphold it. *Hardy v. Mills*, 35 Wis. 141; *Lathrop v. Knapp*, 37 id. 314. According to this rule of law it is apparent the supplemental answer states no defense; for the issue in this action was not necessary involved in the justice's suit, and the plaintiff may maintain it notwithstanding the defendant recovered for his services in that court. The plaintiff's claim for damages resulting from malpractice constitutes a separate and independent cause of action, which he can enforce without disturbing any matter litigated in that case. He was not compelled to make the defense before the justice that the defendant's services were of no value in order to save his rights. He had his election either to recoup his damages *pro tanto* in the justice's court or go for his entire claim in this. It seems to us that this is the better and more convenient rule to lay down upon the subject. If the plaintiff were compelled to make his defense in the justice's court, that the professional services were of no value, and that he had been injured by the defendant's negligence, then it would follow that he must either split up his demand so that there might be two suits instead of one upon it, or content himself with merely defeating the claim for services, or limit his damages to \$200, the extent of the jurisdiction of the justice. We are not inclined to adopt a rule which would lead to any such inconvenient consequences. We say in the language of Mr. Bigelow: "Every cause of action carries with it the right to put it into judgment; and that there is a separate and independent cause of action given to each party results necessarily from the fact that either party may sue the other for a breach. No suit can be maintained except upon a legal ground of

action. Now as one cause of action cannot in itself alone, when merged in judgment, carry another and independent cause of action with it, it is difficult to understand how a judgment for the plaintiff without plea, can extinguish a counter-right of action by the defendant, however closely connected the two claims may be. Every one has the right to try his own case." Bigelow on Estoppel, 194.

The New York authorities are more or less in conflict with the doctrine laid down or recognized in the following cases: *Bodurtha v. Phelon*, 13 Gray, 413; *O'Connor v. Varney*, 10 id. 231; *Bascom v. Manning*, 52 N. H. 133; *Barker v. Cleveland*, 19 Mich. 230; *Mondel v. Steel*, 8 M. & W. 858; *Rigge v. Burbidge*, 15 id. 598; *Davis v. Hedges*, L. R., 6 Q. B. 687.

It is needless to remark that if the plaintiff in this suit had set up the defense of malpractice in the action before the justice, an adjudication upon that issue would then have been a bar. The case then would come within a very familiar principle. *Howell v. Goodrich*, 69 Ill. 556. But upon the facts stated in the supplemental answer we are inclined to hold that the recovery in the justice's court is no bar. The question is very fully examined in the authorities to which we have referred, and further discussion of it seems unnecessary.

By the Court.—The order of the Circuit Court, overruling the demurrer, is reversed and the cause remanded for further proceedings according to law.

So ordered.

CASSODAY, J., took no part.

NOTE BY THE REPORTER.—In *O'Connor v. Varney*, 10 Gray, 231, it was held, SHAW, C. J. giving a short opinion, that a judgment for the defendant in an action for work done under a contract, upon the ground of imperfect performance of the work, is a bar to a subsequent action by him to recover damages for such non-performance. "He cannot use the same defense, first as a shield, and then as a sword."

In *Bodurtha v. Phelon*, 13 Gray, 413, an action was brought before a justice of the peace on a note for the price of a horse. The defendant set up a breach of warranty, and judgment was given for a part of the note. The plaintiff appealed, and the defendant was defaulted. Held, that that judgment was no bar to an action on the warranty. This was put on the ground that on the appeal the judgment before the justice was vacated, the defendant withdrew his defense, and judgment was entered for the full amount of the note. The court said: "The plaintiff could not maintain this action, if the judgment recovered against him on his note given to the defendant for the price of the colt were in force. He would have received in the deduction of forty dollars from the amount of that note, his damages for the deception practiced on him by the defendant in the sale of the colt, and have been thereby barred from any further remedy for that deception."

In *Bascom v. Manning*, 52 N. H. 133, an action of damages for breach of warranty of cotton, it appeared that the defendant had pleaded the same facts in defense of an action

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in Massachusetts for the price of the cotton, but suffered judgment there by default. *Held*, that the Massachusetts judgment was no bar. The court said: "Whether there was in fact a warranty, and if so, whether it was broken, and what amount of damages the plaintiff suffered thereby, are questions which were not in point of fact litigated in the Massachusetts suit, and are not therefore *res adjudicata*. It is true, the plea which was not withdrawn, raised these questions, and there was a judgment for the plaintiffs. But the fact that there was a judgment upon a default makes it as certain that this counter-claim was not passed upon and settled, by an actual adjudication, as though the plea had been formally withdrawn."

In *Barker v. Cleveland*, 19 Mich. 235, it was held that an action for the purchase price of chattels is not affected by a judgment for breach of warranty of the same. The action for breach of warranty does not necessarily involve the question of payment of the price. The action for breach might be brought before the time for payment had elapsed. "Unless the vendor depends on the ground of non-payment of the purchase price, the court does not concern itself with that question."

Mondel v. Steele, 8 M. & W. 838, was an action of damages for breach of a contract to build a ship in a specified manner. The defendant pleaded a judgment in a former action for the price, in which the same breach of contract was pleaded, and a deduction was made from the price on account thereof. *Held*, bad, and that the plaintiff might still recover for damage accruing subsequent to the delivery of the ship. PARKE, B., said: "It must however be considered that in all these cases of goods sold and delivered with a warranty, and work and labor, as well as the case of goods agreed to be supplied according to a contract, the rule which has been found so convenient is established, and that it is competent for the defendant, in all of these, not to set off, by a proceeding in the nature of a cross-action, the amount of damages which he has sustained by a breach of the contract, but simply to defend himself by showing how much less the subject-matter of the action was worth by reason of the breach of contract; and to the extent that he obtains or is capable of obtaining an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract, and is precluded from recovering in another action to that extent, but to no more." This case was recognized in *Riggs v. Burbridge*, 15 Id. 593. This was an action of damages for negligent construction of a kitchen range, and the defendant pleaded payment into court, in an action for the price, of a sum which the plaintiffs took out in satisfaction. *Held*, no estoppel. ALDERSON, B., said: "The present plaintiff may maintain an action against the defendant for negligence in the performance of the work, unless his defense to the former action, for the price of the goods, had been to show that the work and goods were of no value whatever to him." ROLES, B., said: "It does not at all appear that the defense of the present plaintiff to the former action, for the price of these goods, included the damages sustained by him for the improper working of the range." The same doctrine is declared in *Davis v. Redges*, L. R., 6 Q. B. 687. In this case HANNEB, J., says, *Mondel v. Steele*, "leaves undecided the question whether the plaintiff was bound to obtain the abatement in the action in which he was defendant, or might recover it as damages in a cross-action." "It is clear that before any action is brought for the price of a chattel sold with a warranty, or work to be performed according to contract, the person to whom the article is sold, or for whom the work is done, may pay the full price without prejudice to his right to sue for the breach of warranty or contract, and to recover as damages the difference between the real value of the chattels or work, and what it would have been if the warranty or contract had not been broken." "We do not mean to throw the least doubt on the cases which establish the general rule that where a party to a litigation has the opportunity to raise some question, and does not avail himself of it, he is in no better position than if he had raised it."

In *Sykes v. Bonner*, 1 Clin. Super. Ct. 464, the suit was for malpractice, and the defendant pleaded a judgment in his favor for the value of the services, obtained before a justice of the peace, by default of the defendant. *Held*, no bar. The court said: "It was certainly not necessary, in order to entitle the plaintiff in that case to recover, that he should prove that he was not guilty of any negligence in his professional treatment."

Remarking on the principal case, the *Albany Law Journal* says: "The drift of these decisions, it will be seen, is opposed to the New York doctrine. None of them were at-

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luded to in the New York cases. In *Blair v. Bartlett*, FOLGER, J., after laying down the rule that a judgment is conclusive as to every thing necessarily involved in the issue, and that the value of the services was necessarily involved and passed upon, says: 'But if of value they could not have been useless; and if of use they could not have been harmful; and if not harmful they could not have been *mala praxis* in the performance of them. Hence it is *res adjudicata* between these parties that there was not the malpractice, on the allegation of which, in this action, the plaintiff here seeks to recover.' So, in *Dunham v. Dover*, CHURCH, C. J., says: 'If the allegations in this case are true, the defendant was not only not entitled to any freight, but the plaintiff was entitled to a judgment for the whole amount of his damages. I do not see how a right to freight and a right to damages for the destruction of the whole property caused by a violation of the shipping contract can co-exist' These two extracts exhibit the basis of the New York doctrine. While it is unquestionably right in theory, it may well be doubted whether it is convenient or safe in practice. Such estoppels are odious at best. They are founded on a technicality, and probably promote more injustice than they prevent. In the principal case, the action before the justice was brought after the action for malpractice was commenced, and probably for the purpose of getting a technical estoppel. To defeat such an unrighteous attempt was more important and beneficial than to preserve the symmetry of an artificial rule, or to conform the affairs of a careless and unlearned public to the standard of a consistent logical proposition. After all, the "value" established by the former judgment in such cases, and 'necessarily involved' in the determination, is not the absolute value, but the value disconnected from any claim of failure of value." See *Schwinger v. Raymond*, *ante*, 415.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

WESTERN UNION TELEGRAPH COMPANY v. AMERICAN UNION
TELEGRAPH COMPANY.

(85 Ga. 180.)

Contract — public policy — restraint of trade.

A contract by a railroad company granting to a telegraph company the exclusive use and occupancy of its right of way for telegraph purposes, is void as in restraint of trade and as against public policy. (*See note, p. 784.*)

BILL for injunction. The opinion states the case. The defendant had judgment below.

W. W. Montgomery, for plaintiff in error.

Barnes & Cumming and *J. L. Brown*, for defendant.

CRAWFORD, J. The American Union Telegraph Company filed its bill in Richmond Superior Court to enjoin the Western Union Telegraph Company from interfering with it in erecting its lines of telegraph upon the several lines of railroad mentioned in the bill, and also to prevent said Western Union Telegraph Company from setting up certain contracts which it claimed to have with those railroads to the detriment of the American Union Telegraph Company.

Western Union Telegraph Company v. American Union Telegraph Company.

Upon the hearing below, the chancellor refused to grant the injunction prayed for, on the ground that the Western Union had done nothing, and had made no threats to do any thing, to interfere with the American Union Company in building its lines.

The Western Union Company made answer in the nature of a cross-bill to the bill of the American Union Company, and to its cross-bill annexed copies of the various contracts it claimed to have with the various railroad companies named in the bill, and it claimed that said contracts were valid and could not be interfered with, and gave it exclusive telegraph facilities upon the rights of way of those companies, and it prayed that the American Union Telegraph Company be enjoined from proceeding to erect its lines upon such rights of way.

The chancellor refused to grant such injunction, upon the ground that the contracts so set up in such cross-bill and made exhibits thereto are void and of no effect as against the American Union Company in so far as they attempt to set up exclusive right against it. To this ruling the Western Union Telegraph Company excepted, and upon that exception they are at issue here.

The single question made therefore by this record is: Are the contracts between the Western Union Telegraph Company and the railroad companies in so far as they grant the exclusive right to that company of establishing lines of telegraphic communication along their roadways, valid or void? The defendant in error insists that they are void:

1st. Because they contravene the act of Congress of July 24th, 1866.

2d. Because in general restraint of trade.

3d. They are *ultra vires*.

4th. The right of eminent domain would be lost to the State if such contracts can be maintained.

Whether the act of Congress passed in 1866 can affect these contracts executed anterior to its passage is immaterial to this issue, under the view which we have taken of it.

1. The second ground upon which the defense relies is that these contracts are in general restraint of trade and seek to create monopolies, and therefore against the public policy.

It is well known that rapid inter-communication between different points by wire and rail has created a wonderful revolution in commercial operations. Producers, consumers, manufacturers.

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merchants, buyers, sellers, all are brought in close proximity daily intelligence is given of the world's transactions. Trade encouraged, industrial enterprise stimulated, and business in various branches builds itself upon knowledge. In war the communication of intelligence is almost incalculable; in peace scarcely less so. Shall the means then by which it is transmitted be monopolized by a contract between two artificial beings, intangible, and existing only in contemplation of law? Where exclusive rights exist, or such monopolies are established, should be done by a legislative grant, and not by an individual contract. Our judgment therefore is that these contracts are made and entered into to cripple and prevent competition, they thereby enable the plaintiff in error to fix its tariff of rates at a maximum, governed alone by the necessities of its patrons; such contracts are not favored by the law; they are against public policy, because they tend to create monopolies, and are in restraint of trade. Code, § 2750; 40 Ga. 583; *Oregon Navigation Company v. Winsor*, 20 Wall. 66, 68; *Western Union Telegraph Company v. Atlantic & Pacific Telegraph Co.*, 5 Nev. 103; *Union Telegraph Company v. Central Union Telegraph Company*, U. S. C. C. Western District Missouri.

What we have said on the second ground is sufficient to show that our opinion upon the third is that such contracts are void *ab initio*.

2. The fourth ground is, that if the right to exercise such power is admitted to be in the railroad companies, and can be by transferred to this company, then the State's right of eminent domain is gone. This appears to us to be so clear a statement of the inevitable consequences of such a construction that it is unnecessary to say more. The exercise of the power of eminent domain, granted to the railroad companies for certain specified uses, for the benefit of the general public, was never for a moment considered to imply that they could contract with the Western Union Telegraph Company to use their line of wire upon their right of way is undoubted; but if they go beyond that, and undertake to prohibit and exclude other lines therefrom, then they seek to add an unlimited right to one which is itself limited, and this they are powerless to do.

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The State's right of eminent domain extends over every foot of its territory, and the same is held by its owners in subordination to that fixed and co-existing right, and may be taken for public uses upon just compensation.

It is to be remembered that this controversy does not arise upon any effort to displace the lines of wire established by the Western Union Telegraph Company, nor in any way to interfere with the free use and enjoyment thereof, but arises upon an interference, as is claimed, with its exclusive right to occupy the entire right of way of each of these companies. So that the question of compensation cannot arise, unless indeed it is to be given for a right supposed to exist under an illegal contract; that is, that no other telegraph company, except by its consent, shall ever use or occupy any part of the right of way of these several railroad companies. This being so, the act of 1873 does not impair the obligation of any contract made by the plaintiff in error with these companies, although it does provide the mode by which an unused and unoccupied portion of their roadways may be condemned.

4. It is however urged that the contract made with the Western and Atlantic Railroad is to be maintained, because made whilst under State control. We know of no power vested in the governor or superintendent of that road, authorizing them to convey any right of way along its line to any company by which such exclusive rights as are here claimed could be maintained. To authorize the grant of such exclusive rights, either for a term of years or in perpetuity, would, as we have already said, require more than executive consent; it must come by legislative act.

The law of the case, in our opinion, is as ruled by the chancellor, and in his judgment is affirmed.

Judgment affirmed.

NOTE BY THE REPORTER.—In *Western Union Telegraph Company v. Union Pacific Railroad Company*, U. S. Circuit Court, District of Kansas, June 30, 1880, it was held by McCARY, C. J., and FOSTER, D. J., that a provision in a contract between a telegraph company and a railroad company, to the effect that the telegraph company will transmit the family, private and social messages of the executive officers of the railroad company free, is against public policy, and immoral, and taints the entire contract, so that a court of equity will not enforce it, or grant any relief to a party claiming under it. The court said: "That this provision of the contract is against public policy and therefore void, is, to my mind, entirely clear. It amounts to an agreement to give to each of the officers of the company who made the contract, and to each of their successors who should maintain it, a valuable consideration for his official action in that behalf; a consideration of a private and personal character, inuring to the officers' private benefit and gain, and not to the benefit of the company or other stockholders. It is said however that this feature of

the contract may be eliminated, and that the remainder may stand and be enforced. It is true that the policy of the law is to effectuate rather than defeat a contract, and to this end parts or provisions which are comparatively unimportant, and which may be severed from the contract without impairing its effect or changing its character, will sometimes be suppressed. 2 Pars. on Cont. 505. But the clause above quoted cannot be set aside as unimportant. It constituted, to say the least, one of the considerations on which the contract was made, and it is well settled that 'if the contract be made on several considerations, one of which is illegal, the whole contract is void, and that whether the illegality be at common law or by statute.' " "The officers of a railway company are quasi public officers. Their duties are of a fiduciary character. They are, in an important sense, trustees. To pay them individually any thing of value for executing a corporate contract is grossly unlawful, and taints such contract with moral turpitude. Vast interests, in which the public, as well as the immediate parties, are deeply concerned, are intrusted to the control and management of such officials; and in my judgment, there are important considerations of public policy which demand that courts of justice shall hold them to a strict account, and shall never for a moment recognize as valid a contract obtained by paying directly or indirectly to such officials any consideration, whether large or small."

BUSH V. ROGAN.

(65 Ga. 320.)

Fraudulent conveyance — valid between parties.

The grantee in a deed executed to defraud the grantor's creditors can maintain ejectment against the grantor.

EJECTMENT. The opinion states the case. The plaintiff had judgment below.

D. A. Vason, for plaintiff in error.

D. H. Pope, for defendant.

HAWKINS, J. This was an action of ejectment brought by the plaintiff in error against the defendant to recover a house and lot in the city of Albany.

The muniment of title relied upon by the plaintiff was a warranty deed from J. J. Bush, who was the son of plaintiff, dated the sixth day of January, 1876, and recorded January 15, 1877. J. J. Bush having moved and died before the suit was brought, the widow of J. J. Bush defended the action, and relied on the evidence contained in her interrogatories to defeat the plaintiff's recovery. It appears that when the plaintiff took the deed he paid J. J. Bush \$600 cash for the same, the full consideration.

Mrs. J. J. Bush, widow of J. J. Bush, testified that J. J. Bush, at the time of making the deed to the city lot in Albany, Ga., to M. H. Bush, was, as he said, embarrassed pecuniarily, and made the deed to prevent his creditors from troubling him; this evidence was objected to on the ground that it was the sayings of the vendor after the execution of the deed, which was overruled and the testimony admitted.

The court charged the jury that if it appeared to them that the sayings were after the title passed to the plaintiff, the jury would not consider the testimony, but if before, it was competent.

Was this testimony competent either before or after the execution of the deed, to defeat the recovery of the land by the plaintiff from the vendor or his heirs, administrator or assigns, upon the ground that the same was executed to delay, defeat or hinder creditors? We think not.

This court has settled the doctrine that a man is estopped by his deed, and he will not be permitted to prove the contrary except in cases abhorrent to law and public policy, such as usury, etc.; and this is true in cases where the deed is made to defraud creditors. A deed to delay, defeat, hinder and defraud creditors is void as to creditors, but good between the parties, and where the consideration is paid, neither the vendor nor his representative can set up the fact of the fraud to defeat a recovery. There are exceptions to the general rule, such as usury, gaming contracts, and such as the ascertainment of the truth is in furtherance of public policy; and whilst the law will leave parties in *pari delicto* in certain cases, and forbid inquiry, upon the principle that the law will not assist in a wrong, yet in cases of fraudu'ent conveyances where the consideration is paid, the transaction will be upheld *inter sese*, and neither the vendor nor his representatives will be allowed to allege the contrary.

In 1 Ga. 551, this court says: "A party claiming under a grantor, as distributee or legatee, cannot impeach his deed or grant for the want of consideration, or because it was intended to defraud creditors; both the grantor and his privies are estopped."

In *Goodwyn v. Goodwyn*, 20 Ga. 600, this court says: "If A. sells property to B. to defraud his creditors, while the compact is void as to creditors, it is nevertheless good as between A. and B. If B. paid the money for the property he can sue for and recover it. Not so however if no consideration or price was paid." See also 19 Ga.

290, where the same ruling was made in the case of *Crossby v. DeGraffenreid*; *Beale v. Hall*. 22 Ga. 431. In the case in 44 Ga. this court has recognized the distinction in this class of cases where the conveyance was voluntary, and where the whole consideration was paid.

This being a controversy between the grantee and the representative of the grantor, we do not think it was competent to avoid the recovery by the declaration of the grantor that the deed was made to delay his creditors.

By the 24th section of the 13th and 27th Elizabeth, against conveyances to defraud creditors, and which is of force in Georgia, it is enacted that every conveyance to defraud creditors shall be void as to such creditors, and them only, and so is the Code, § 1951.

The rules of evidence are founded on the soundest policy and reason, and are wisely accommodated to the transactions of mankind. They pervade all classes of the community and are equally applicable to the Commonwealth, the late proprietaries and each individual citizen. The oral or written assertions of any man may be received in evidence against himself, his heirs, and all persons claiming under him, because each of them stands precisely in the same situation and represents him. But when third persons set up an adverse title to such heirs or claimants, derived from some person's grant or contract made by the original party, or some act done by themselves, their interest ceases to be the same, and such party cannot by declarations invalidate their conflicting claim.

It is *res inter alios acta*, and if provable at all, must be by the best evidence in the power of the party.

Judgment affirmed.

RIVERS V. CITY COUNCIL OF AUGUSTA.

(65 Ga. 376.)

Municipal corporation — ordinance — suspension.

The plaintiff was gored by a cow running at large in a city street. The city council had passed an ordinance forbidding cattle running at large in the streets, but subsequently suspended it, and the injury occurred during the suspension. *Held*, that there was no cause of action against the city.

ACTION of damages for personal injury. The opinion states the case. The defendant had judgment below.

D. F. Myers, W. K. Miller and Frank H. Miller, for plaintiff in error.

W. & T. H. Gibson, and Foster & Lamar, for defendant.

CRAWFORD, J. Mary P. Rivers, a minor child, whilst walking on the sidewalk of one of the streets in the city of Augusta, was set upon and seriously gored by a cow which was running at large in the streets of that city. For the damages which she sustained by reason of this misfortune she brought suit against the corporation.

The allegations were substantially, that under its statutory authority, it had power to pass all ordinances, rules and regulations necessary for the good government, health and safety of the property and persons in said city, and to establish such respecting the streets and sidewalks as to keep them in a safe condition for the use of its citizens, as well as power to abate all nuisances that existed therein. That in 1878 cattle were forbidden the use of the open streets within certain named districts in the city, but that this ordinance was afterward suspended indefinitely. That by virtue of its police power it was the duty of the city to keep the public streets in a safe condition for travel and the use of its citizens, but being unmindful and neglectful of this duty, it did not keep cattle from straying therein, and permitted them to do so without attempting to prevent it. By means whereof the plaintiff, without fault on her part, was injured and damaged by a cow, the property of one Hanson, who had paid taxes to the defendant upon her, with its knowledge that she was to be kept within the limits of the city, and roam through its streets at will. That this system of allowing cattle the use of the streets was not reasonably calculated to insure the safety of the people, yet in consideration of the taxes paid the same was permitted, the defendant thereby undertaking to protect the citizens, but which it has failed to do.

To this declaration a demurrer was filed, which was sustained by the court, and the plaintiff excepted.

1. By this writ of error we are brought for the first time in this State to rule upon the direct principle invoked as law in this case.

It is undoubtedly the duty of law-makers to provide for the safety

Rivers v. City Council of Augusta.

of the persons whose protection is committed to their care, but there are injuries which law cannot prevent, and for which parties suffering cannot recover. Calamities and accidents are common to all, but because they occur, it by no means follows that such as may be so unfortunate are entitled to recover compensation in damages out of some person, either natural or artificial, who may be able to respond, notwithstanding it appears that such impressions are beginning largely to prevail. Casualties, the result of misfortune, or one's own negligence and not that of another, are *damnum absque injuria*.

In the case before us the city of Augusta having the right to pass all laws and ordinances necessary and proper for its government, is charged with liability in damages for injuries suffered by the plaintiff because of its negligence in allowing cattle to run upon its streets, accepting a consideration therefor in the way of taxes, and this after the exercise of their right to prohibit it; and especially because in suspending this ordinance one of the reasons stated in the preamble was the too luxuriant growth of the weeds and grass for the health, comfort and good appearance of the city.

The powers and duties of the city council of Augusta, under its charter, consists in acts which are legislative or judicial in their nature, and those which are purely ministerial. For a failure to perform the first, or for errors of judgment committed in their performance, the corporation is not responsible, because they are deemed to be but the exercise of a part of the State's power, and therefore under the same immunity.

The rule however for the last is different, as damages may be recovered either from the neglect to perform them, or from performing them in an unskillful, negligent, or improper manner. 2 Thompson Neg. 731; *Goodrich v. Chicago*, 20 Ill. 445; *Griffin v. Mayor*, 1 N. Y. 459; *Levy v. Mayor*, 1 Sanf. 465.

The adoption of an ordinance in reference to allowing cattle to run at large in the city, is one which is wholly legislative, and therefore discretionary. It is not liable in damages for neglecting omitting or refusing to notice the subject, or having noticed it, and adopted an ordinance concerning it, then to repeal or suspend it indefinitely. 2 Dill. Mun. Cor., § 753.

This, as well as other matters involving municipal legislation must depend upon the judgment and wisdom of the council, according to its view of the public necessity or advantage; being as

imperium in imperio, their acts lay no foundation for damages resulting from erroneous conclusions, and this seems to be the unbroken current of the authorities on the subject.

2. But it was insisted on the argument that so long as a city fails to legislate it is not liable, but when it does, then its liability for damages accrues. We are unable to appreciate this difference.

The case of *Hill v. Board of Aldermen of Charlotte*, 72 N. C. 55; s. c., 21 Am. Rep. 451, ruled directly upon a similar point. An ordinance prohibiting the use or exhibition of fire-works was passed, remained of force two or more years, was then suspended from the twenty-fifth day of December to January 1st, inclusive, during which time by the firing off of squibs, fire-crackers, and Roman candles, the plaintiff's house was burned, for which loss he brought suit against the city. *Held*, that it was within the discretion of the authorities to determine, from time to time, what ordinances were proper, and that the corporation was not liable to the plaintiff for the destruction of his property.

To hold a municipal corporation after legislation liable for all damages which might occur in connection with the subject-matter thereof, would be contrary to precedent and authority. Nor would the collection of a tax required by such legislation enlarge the right claimed.

To say that the exercise of the discretionary power by the council would preclude the city from the repeal of an ordinance without leaving behind it a liability for damages, appears to us unsupported by authority. It is true that there are many acts which are discretionary, and may or may not be done; as for instance, to open streets, grade sidewalks, dig sewers, build a bridge, provide water, and many other things for a failure to do which no action lies, how much soever private interests may suffer; yet when the discretion is used, and the work is done, if done so negligently or unskillfully as to damage other parties, then a right of action lies. But in no case, for the simple exercise of the power itself, disconnected from its negligent or unskillful execution, is the corporation responsible. We think therefore that the ruling of the judge below was right and must be sustained

Judgment affirmed.

McELROY v. CITY COUNCIL OF ALBANY.

(55 Ga. 387.)

Municipal corporation — tort by police officer.

A city is not liable for a wrong committed by one of its police officers wantonly and not in the discharge of his duty.*

ACTION of damages for personal injury. The opinion states the case. The defendant had judgment below.

H. Morgan & L. Arnheim, for plaintiff in error.

Wooten & Jones, for defendant.

JACKSON, C. J. This was a demurrer to the plaintiff's declaration; the demurrer was sustained and the suit dismissed, and error is assigned thereon.

The substance of the allegation in the declaration is that a city watchman, *quasi* a policeman, willfully and maliciously, while drunk, threw the plaintiff down and broke his leg; and the question is, can the plaintiff recover from the city in such a case?

Without going into the question so elaborately and ably argued by counsel for the plaintiff in error, as respects the liability of municipal corporations for the misconduct of their own agents and servants for mere local duties and not created by statute, as contradistinguished from those created by statute and agents of the State as well as servants of the corporations, it is enough to say that so far as policemen are concerned, the point is settled that the corporation is not liable, in *Cook v. City of Macon*, 54 Ga. 468, though the policeman was there engaged in making an arrest, and therefore was within the scope of his agency. In the case at bar, the watchman was clothed with police powers and is called a *quasi* policeman in the declaration, and the principle ruled in 54 Ga. will cover his conduct on this point, the police of Macon being as much servants and agents of that corporation, for local purposes, as this watchman was for Albany in the case at bar. And here this case might rest.

But this watchman was in no sense engaged as the agent of the city of Albany in this transaction. He was not attempting to make an arrest when he threw the plaintiff down and did him the serious

* To same effect, *Grumbine v. Mayor* (2 McArthur, 578), 29 Am. Rep. 626.

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injury, nor was he in the act of trying to do any duty for the city; but he was acting as an independent man, as principal, and not as agent for anybody. In such a case the doctrine of *respondet superior* does not apply, because there was no superior or principal or master in the matter. Dill. Mun. Corp. 772, and cases cited.

Judgment affirmed.

DWINELL V. BROWN.

(85 Ga. 438.)

Landlord and tenant—rent paid to one not having title—action for.

One who has paid rent for land claimed by the lessor, and has peaceably and undisturbedly enjoyed the full term, cannot recover that rent from the lessor, although the lessor has been ejected or has voluntarily surrendered to a superior title.

ACTION to recover money paid as rent. The opinion states the case. The plaintiff had judgment below.

J. Branham, for plaintiff in error.

J. H. Reese and *C. D. Forsyth*, for defendant.

CRAWFORD, J. Dwinell, the plaintiff in error, being in the possession of certain real estate in the city of Rome, rented to Brown & Lumpkin the right to build upon it a meat market, for which they were to pay him \$5 a month, with the right reserved to them of removing the building, unless they were in arrears for rent, then it was to be subject to the payment of the same. In pursuance of this contract the building was put up, used and occupied as a meat market, and most of the rent paid upon it until the lot was sold, at which time the rent contract was to terminate.

The lot, after this sale, was surveyed, and it was then ascertained to be no part of Dwinell's as it had been theretofore considered. Brown having the whole interest in the assets of the firm, then brought suit to recover the amount of money paid over to Dwinell for rent, and the question in this case is, whether he is legally entitled to recover it back.

The testimony shows that Dwinell was at the time of the renting.

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and for sometime before, in the possession of the land, claiming in good faith, using it as his own, and realizing from it an income. That Brown & Lumpkin, after the renting, entered, cut away a part of Dwinell's improvements, built upon and used the premises to the end of their contract, and paid all except a small part of the rent money.

Upon this state of facts our judgment is that they cannot recover they got what they bargained for, enjoyed the benefit of their contract without interruption for the time agreed on; there was no fraud, or deceit, or bad faith on the part of Dwinell, and no reason therefore on their part for complaint. Besides they were his tenants and unless they were disturbed in their possession, or had been called upon and required to attorn to another, they could not have defeated him in the collection of his rents. Even if it be true that he rented them the right to occupy land which he thought he owned but did not, that is a matter with which they had no concern so long as he protected them in its enjoyment, and against the claim of whomsoever might be the true owner. The contract between them has been fully executed, they receiving the use and occupation of the land, and he the money for the same.

One in possession of land under a claim of right, renting it to another, who enjoys the full term of his lease without being interrupted, or required to attorn to another, cannot recover back the money paid to his landlord, though the same land may afterward be recovered from his landlord by action of ejectment, or by a voluntary surrender thereof to a superior title without suit.

Judgment reversed.

GEORGIA PENITENTIARY COMPANY V. NELMS.

(55 Ga. 490.)

Constitutional law — hiring out convicts — "donation or gratuity."

The letting of the labor of convicts to a corporation under legislative authority, in consideration of their being fed, clothed, and provided for by the hirer, is not a "donation or gratuity," within the meaning of the Constitution.

BILL for injunction. The opinion states the case. The defendant had judgment below.

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Georgia Penitentiary Company v. Nelms.

James M. Smith and Hopkins & Glenn, for plaintiffs in error.

McCay & Abbott and A. Johnson, for defendants.

SPEER, J. This is a bill filed by plaintiffs in error seeking to enjoin John W. Nelms, as principal keeper of the penitentiary, from delivering to the Marietta and North Georgia Railroad Company, and said company from receiving, any convicts under a resolution of the general assembly of 1879, "which directed the principal keeper of the penitentiary to furnish the Marietta and North Georgia Railroad Company two hundred and fifty convicts upon certain conditions therein specified."

The complainants allege that by a contract dated 21st June, 1876, the State leased to them all of the convicts (except a certain proportion that was to go to Penitentiary Company No. 1) for twenty years from and after the first day of April, 1879. The contract of lease of complainants as well as the claim of the two hundred and fifty convicts by the Marietta and North Georgia Railroad Company both are under the authority of and derived from an act of the general assembly approved the twenty-fifth day of February, 1876, entitled "an act to regulate the leasing out of penitentiary convicts by the governor, and authorizing him to make contracts in relation thereto."

[Omitting a question of practice.]

In considering and reviewing the decision then pronounced, we are satisfied the same should be sustained and affirmed. Since the decision had at the last term, complainants have amended their bill and on said amendment applied for an injunction again, seeking to restrain the turning over of the two hundred and fifty convicts to the Marietta and North Georgia Railroad. In said amendment they allege and charge as follows: "That the act of 1876 referred to in the original bill contained this clause: 'Before any disposition is made of the convicts as contemplated under the provisions of this acts, his excellency, the governor, shall be authorized to furnish the directors of the Marietta and North Georgia Railroad Company, upon their application for the same, two hundred and fifty convicts, or so many thereof as they may desire, without charge, for the space of three years, upon their giving satisfactory obligations to feed, clothe, and provide for the same under such regulations as his excellency, the governor, may require for the safe-keeping and proper care of said convicts.'

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"But said convicts shall be used by said railroad company exclusively for the benefit of their railroad, and for violation of this condition the governor may vacate the lease."

Under this clause, it is alleged, the defendants claimed the right to have the two hundred and fifty convicts for three years from the first day of April, 1879. Complainants further charge that under this clause of the act of 1876, there was granted to the Marietta and North Georgia Railroad Company a "donation" or "gratuity" and that the same was illegal and void in this, that the Constitution of the State required for its passage a concurrence of two-thirds of each branch of the general assembly, and that the yeas and nays on the passage thereof should be entered on the journals of each house. It is alleged that this act did not pass by a two-third vote; neither were the yeas and nays on its passage recorded. They allege the same is also true of the act of February 2, 1876, and of the resolution of the legislature of the last session referring to these convicts, and insist no rights could be acquired by defendants under any of these acts, but they are null and void. This is the main question made by the amended bill, and the refusal of the court below to grant an injunction on this ground brought here for review.

The second paragraph, sixth section of the Constitution of 1868 is in the following words: "No vote, resolution or order shall pass granting a donation or gratuity in favor of any person except by the concurrence of two-thirds of each branch of the general assembly, nor by any vote to a sectarian corporation or association."

Is transferring to the Marietta and North Georgia Railroad Company the two hundred and fifty convicts for three years from the first day of April, 1879, without charge, upon such terms and conditions as are contained in the act of 1876, such a "donation" or "gratuity" as would require the same to be passed by a concurrent vote of two-thirds of each branch of the general assembly? In construing any portion of the Constitution, courts give to the words of that instrument involved in the construction their legal definition.

Donation is defined by Bouvier to be "the act by which the owner of a thing voluntarily transfers the title and possession of the same without any consideration." Bouvier's L. D. It certainly will not be insisted that the State at the date of this act had the title to these convicts. They were persons who, by reason of their

violation of the penal laws and their trial and conviction therefor, had forfeited, for a certain time, their liberty or right of locomotion, and who were under the law subject to confinement and labor for a specified term.

In the exercise of its sovereign rights for the purpose of preserving the peace of society and protecting the rights of both person and property, the penitentiary system of punishment was established. It is a part of that police system necessary, as our law makers thought, to preserve order, peace and the security of society. The several terms of these convicts fixed by the judgments of the courts under authority of law, simply subject their persons to confinement, and to such labor as the authority may lawfully designate. The sentence of the courts under a violated law confers upon the State this power, no more. The power to restrain their liberty of locomotion, and to compel labor for the purposes not only of health, but also to meet partially or fully the expenses of their confinement, etc. The confinement necessarily involved expenses of feeding, clothing, medical attention, guards, etc., and this had been in its past history a grievous burden upon the tax payers of the State. Surely it was competent for the sovereign to relieve itself of this burden by making an arrangement with any person to take charge of these convicts and confine them securely to labor in conformity with the judgments against them for a time not exceeding their terms of sentence. It was a transfer by the State to the lessee of the control and labor of these persons in consideration that they would feed, clothe, render medical aid and safely keep them during a limited period. This agreement on the part of the State (subject to all her rights as a sovereign) is not a "donation," since it does not transfer "the title" of the article (merely the possession), nor is the transfer without a consideration. A consideration is valid in law "if any benefit accrues to him who makes the promise or any injury to him who receives the promise." Code, § 2740. Bouvier defines it to be "a compensation which is paid or an inconvenience suffered by the party from whom it proceeds." Bouv. Law Dict., § 278. Blackstone defines it to be "the reason which moves the contracting party to enter into the contract." 2 Bl. Com. 443.

Taught by the experience of the past, this court holds that the saving to the State of the burden of confining in proper prisons, or by guards, feeding, clothing, furnishing medical treatment to these

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convicts, was a valid and legal consideration, paid by the Mariet & North Georgia Railroad for these two hundred and fifty convicts and relieves the transfer made to that company of the control a labor of the same by the State from being either a "donation" "gratuity" within the meaning of the Constitution. A gratuity is defined to be "a present, a recompense, a free gift." Bouv. L. Law Dict. A gratuitous contract, such as complainants allege to be, is defined to be "one, the object of which is for the benefit of the person with whom it is made without any profit received promised as a consideration for it, as example, a gift." Bouv. L. Dict. 568; 1 Bouv. Inst. 709. Our judgment then is that the act of 1876 was not illegal and void by reason of not having received the concurring votes of two-thirds of each branch of the general assembly.

The question as to whether these convicts are employed by the defendants in conformity with the law of their transfer, or what number may have been received by the defendants at the filing of the complainant's bill, are questions of fact about which there is a conflict of evidence in the record, and can be best determined by a jury on the trial. For these reasons, we see no abuse of discretion on the part of the judge below in refusing this injunction, and judgment is therefore affirmed.

Judgment affirmed.

ANDERSON V. ANDERSON.

(55 Ga. 518.)

Judgment—of another State—discharge in bankruptcy.

To a suit in Georgia on a judgment rendered in Tennessee the defendant pleads his discharge in bankruptcy. The adjudication of bankruptcy was made pending the suit in Tennessee, but the defendant did not there plead it to stay the proceedings, and his discharge was granted after the judgment. *Held*, a valid plea.

DEBT on a foreign judgment. The opinion states the case. The plaintiff had judgment below.

R. J. McCamy, for plaintiff in error.

Anderson v. Anderson.

W. H. Payne, J. H. Anderson and I. E. Shumate, for defendant.

HAWKINS, J. On the twelfth day of April, 1875, James H. Anderson, in a Chancery Court in the State of Tennessee, obtained a judgment against the plaintiff in error, J. M. Anderson, for \$521 besides interest and costs.

On the seventh day of April, 1879, he brought his action of debt on this foreign judgment against the plaintiff in error, in Catoosa Superior Court. To which the defendant pleaded his discharge in bankruptcy, and on an agreed statement of facts the judge, without a jury, awarded a judgment for the plaintiff.

By the agreed facts, it appears that J. M. Anderson, on the twenty-third day of March, 1875, was indebted to J. H. Anderson in the sum of \$521; that on that day suit was then pending in the Chancery Court of the State of Tennessee, the residence of said J. M. On that same day J. M. was adjudicated a voluntary bankrupt on his own petition, with due notice to all his creditors as the law required. During the pendency of the bankruptcy proceedings. to wit, on the twelfth day of April, 1875, judgment was rendered against the said bankrupt for the full amount, no plea being filed, and no suggestion of bankruptcy, and no effort to stay proceedings. On the eleventh day of December thereafter, the said J. M., was duly discharged as a bankrupt from his debts, which existed on the twenty-third day of March, 1875.

This debt is such a debt as would have been affected by the discharge, unless the judgment rendered as aforesaid prevented it. Neither the judgment nor the debt were proved in bankruptcy.

The question therefore for adjudication is not so much what effect the discharge has upon the judgment in the State of Tennessee. whether the same is still unaffected by the discharge, or remains intact and operative in every respect and enforceable at law in the same way and to the same extent as if no bankruptcy had supervened, but whether to a suit upon a foreign judgment, obtained upon a debt since 1868, the plea of the bankrupt's discharge granted before the suit is a good defense.

The solution of that must rest upon several propositions. If it is a provable debt against the bankrupt's estate, can the lien of a judgment be preserved from sale and the debt still become extinct? What effect has the failure of the bankrupt to suggest bankruptcy when suit on a provable debt is pending, or the judgment obtained

after his adjudication, and what distinction is there between right obtained by the judgment in the State of Tennessee and one sought by the pending action of debt in Catoosa county?

Let us examine these legal elements in the light of the bankrupt law, the decisions of the courts and reason.

Every debt of whatsoever kind made by the bankrupt before date of his adjudication, except those created by fraud in a fiduciary character, or having a legal lien allowed by the law of *status*, is provable in the bankrupt court, and when a discharge granted the bankrupt is relieved from all such provable debts, by the amendatory bankrupt act of 1873, his discharge extends all liens, judgments, etc., as well as other liabilities, but it is unnecessary here to consider that amendatory legislation to the system of bankruptcy. Whatever our respective opinions may be upon that subject, and its effect upon existing contracts, liens, etc., before and after 1868, we adhere to the decisions of this court touching those questions until the Supreme Court of the United States shall by decision settle what is now so in conflict, nor is it germane to the case at bar.

If therefore this be one of the class not by fraud, or in a fiduciary nature and having no lien, then it must be that the discharge of the bankrupt is a good plea to its enforcement.

The object of the plaintiff is not to enforce the lien of his judgment obtained in a Tennessee court, for that can have no extrajurisdictional legal merit. It operates upon and binds nothing, and is a lien upon nothing. It can no more be enforced in Georgia than the original debt upon which it is founded.

In our law it is called a debt of record, suable as any other debt, promissory note, bill of exchange, covenant or contract, and by a similar action, the only difference being that the judgment is an estoppel as to all matters pleadable before judgment and before the lien is created. In other words, the judgment binds the defendant just as a judgment would bind in the case upon other contracts when obtained, but in neither case is the lien created until judgment, and all are subject to the defenses of payment, release and discharge, and the like.

So this debt, whether an old or a new one, whether the contract being merged in the judgment and constituting a new debt of record, or remaining as an old debt with a new form and security, cannot change its legal status, as a debt stripped of its lien

judgment, whether the judgment in Tennessee was a new debt or a new security for the old one, either or both would be but a debt here without a lien, and the plea would be good, unless the failure of the bankrupt after his adjudication to plead or apply for a stay of proceedings, would bar him of the right. The proceedings in bankruptcy were pending when the judgment was obtained, when the bankrupt was *civiliter mortuus*, and when the bankrupt law forbade all proceedings in the State court.

In those cases where it was held that the bankrupt was concluded by a judgment obtained after adjudication, the courts put their ruling upon the ground that it was a new debt, and being a debt after adjudication, was binding on the defendant in any form, whether by contract or judgment; by a reference to the brief at the end of this opinion, it will be seen that the better rule is that the judgment is not a new debt, but the old debt is only merged in the judgment, and thereby obtains another security, the one provided by law.

So are all of our decisions in reference to the homestead exemptions, in every case this court holding that the date of the contract and not the judgment determined the question of exemption. So there is nothing in the two cases relied on here and decided by this court, of *Steadman v. Lee* and *Freeman v. Roberts*, contrary to this doctrine. In those cases, one an illegality the other a claim, the questions were as to enforcing liens; besides the judgments were obtained after the discharge of the bankrupt.

After discharge he was *sui juris* to all intents and purposes, and was as much bound on a judgment by default even upon a debt before his adjudication as any other person failing to make defense, and his failure to plead was similar to the default of any other person who had been sued. If the case had been on *scire facias* to revive a dormant judgment under our law, the defendant could set up payment, discharge or release after judgment.

So we think the true rule is, that the judgment on a contract is not a new debt, in the sense of contract debts, but is the old debt maintained with a new security—the old debt is merged, so to speak, in the judgment. As to all defenses then existing it is conclusive; but as to a bankrupt discharge, in no sense is it a new debt.

The defendant, by his plea of discharge, does not seek to interfere with the plaintiff's judgment in the State of Tennessee, but he

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says, I am no longer personally liable for the debt, and the fact that no plea was filed and no application to stay the proceedings in the Tennessee court, cannot affect my right to plead a discharge from the obligation of the debt without interfering with the lien on the judgment. The two are distinct, and in no way can the one affect the other, except to be pleaded as a discharge. Whatever may be done by this action in Georgia will not interfere with the judgment in the State of Tennessee; and if so, it is quite unnecessary here to decide to what extent, for the whole scheme of the bankrupt law discharges the bankrupt from the debt and preserves the lien, as this court has held in several cases; the debt gone but the lien remains.

If the defendant in error was seeking to enforce a judgment lien obtained in this State pending the bankruptcy proceedings, after discharge, the bankrupt might not be allowed to say aught against the lien, but certainly the debt would be discharged, and when he had exhausted his lien remedies, and by an action of debt sought personal liability of the bankrupt, then the discharge would avail. So we think the court erred in its judgment.

See *Holbrook v. Foss*, 27 Me. 441; *Thompson v. Hewitt*, 6 Hil 254; § 20, Bankrupt Law; *Harrington v. McNaughton*, 20 Vt. 29; *Downer v. Rowell*, 26 id. 397; *McDonald v. Ingraham*, 30 Miss. 38; *Rogers v. West, M. & F. Ins. Co.*, 1 La. Ann. 161; 1 Sanf. 65; *Peck v. Jenness*, 7 How. 612; Bump on Bankruptcy, 736-74; *Dresser v. Brooks*, 3 Barb. 429; *Johnson v. Fitzhugh*, 3 Barb. Cl 360; *Stratton v. Perry*, 2 Tenn. Ch. 633; *Monroe v. Upton*, 50 N. Y. 593; *Martin v. Blakemore*, 5 Heisk. 54.

Judgment reversed.

TURNER V. GRANGERS' LIFE AND HEALTH INSURANCE COMPANY.

(65 Ga. 640.)

Corporation — subscription to stock — fraud.

One who has been induced to subscribe for corporate stock by fraudulent representations cannot recover the amount paid until the claims of creditors the corporation are satisfied.*

*See *Miller v. Hanover Junction & Susquehanna R. Co.* (87 Penn. St. 96), 30 Am. Rep. 8
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THE opinion states the case. The defendant had judgment below.

Harvey & Hamilton, for plaintiff in error.

C. Rowell, for defendant.

HAWKINS, J. On the thirteenth day of December, 1877, Turner sued out an attachment against the defendant, returnable to Floyd Superior Court, and which was executed by service of garnishment, for the sum of \$250.

To this action the defendant, a foreign corporation doing business in this State, filed several pleas, and after the charge of the court hereinafter alluded to, the jury found a verdict for the corporation against the plaintiff. A motion for a new trial being made and refused, this writ of error seeks the review and reversal of the court below for so refusing the new trial.

It seems that the corporation was organized by the laws of Alabama in 1874, and was doing business there and here when, on the tenth day of August, 1874, Turner subscribed for \$2,500 of the stock of said company, being twenty-five shares of \$100, each. He was induced to subscribe for said stock by the statements of said company, who told him that \$100,000 had been subscribed and paid in cash at the home office at Mobile, Alabama. The agents were England & Covey, who also exhibited a pamphlet of the company to prove it had been paid in. They also represented that the loans and assets of the Georgia department were to be kept in Rome, in the Georgia department.

It will be seen that by its provisions the corporation was endowed with power to establish branch departments, and in pursuance thereof did establish several, one in the State of Georgia in August, 1875, and plaintiff was a trustee under the constitution, and was insured in said company as required by its laws.

It was also alleged that the stock of said company was worthless at the time suit was brought; that the company had before trial made an assignment of all of its assets and property; that at the time plaintiff subscribed \$100,000 had not been paid in in cash at the home office in Mobile, and that only the sum of \$8,850 had been paid in by the stockholders of the home company in cash.

Plaintiff demurred to the pleas filed by the defendant, the corporation, which demurrer was overruled by the court, and the de-

cision of the court upon the demurrer, and the charge to the pleas, must control this case and make it un-
lud to the voluminous evidence had on the trial.

The pleas were in substance, that after plaintiff and before suit brought, the company made contra-
red liabilities to and with other parties by issuing in
other ways, to the amount of \$25,000, which sums are
owing, and appended a list of such creditors; but was
paid if the plaintiff and others recover the sums upon
their subscriptions to the stock of the company.

On the trial, it appeared that there were debts of less
than the one sued for, contracted after the subscription
plaintiff, and the court charged the jury, that if the
evidence that the plaintiff is a shareholder, and
ten per cent, he cannot, in this action, recover it
company, if there appear from the evidence, *bona fide*
the company unpaid, to any amount equal to the claim
this action.

Upon which the jury found a verdict for the defendant,
tion for new trial being overruled, Turner brings this

The evidence was abundant that the company owed
the subscription greater than the one sued for, and if
submitted by the court be correct, that ends the case.

We think as to all debts made by the corporation
scription, Turner was concluded, whether his subscription
induced by fraud or not, for as to such the funds of the company
including his subscription, were trust funds to pay the

We do not say but in a proper case the plaintiff could
fraudulent representations to avoid his subscription
that as to subsequent creditors, in this attachment
cannot defend against the corporation as to creditors
after his subscription. So we think the court did not
the new trial.

Judge

ACTION — *Continued.*

assignor taken by him under attachment from the possession of the assignor's mortgagee. *Axford v. Matthews* (Mich.), 185.

See ABATEMENT, 474; ASSESSMENT, 403; BOUNDARY, 813; COMMIT, 491.

ADMINISTRATOR.

Judgment against — effect of, as to lands — limitation.] An administrator has no power to renew a debt of the decedent, barred by the Statute of Limitations, so as to make it effectual as to the decedent's lands; and the heirs may plead the Statute of Limitations as against a judgment recovered on such renewed debt against the administrator. *Steele v. Steele's Administrator* (Ala.), 15.

ADVERSE POSSESSION.

1. **Agreement as to boundary — mistake.]** By oral agreement between two adjoining owners of land one maintained a division fence entirely within his own bounds for more than twenty years. Subsequently he removed it to the true boundary. *Held*, that ejectment would not lie in favor of the other for the strip of land between the old line of the fence and the true boundary. *White v. Hapeman* (Mich.), 178.
2. **Boundary — pasturing on land left dry by receding pond.]** One owned a pasture bounded by the edge of a mill-pond of another. The pond gradually dried up by reason of the want of repair of the dam. The cattle, turned into the pasture, followed the receding water and pastured on the dry bed. *Held*, that this afforded no foundation for a claim of adverse possession of the bed of the pond. *Eddy v. St. Mars* (Vt.), 695.

See BOUNDARY, 505; CONSTITUTIONAL LAW, 569.

AGENCY.

1. **Instrument by public officer — mode of executing.]** A due bill "for work done on the Hazel Valley school-house and hall," and signed by two individuals with the addition "committee," is the personal obligation of the signers. *Anderson v. Pearce* (Ark.), 39.
2. **Revocation — right to compensation.]** When a broker has been allowed a reasonable time to produce a purchaser and effect a sale, and has failed so to do, and the principal in good faith and fairly has terminated the agency, and sought other assistance by the aid of which a sale is consummated, the fact that the purchaser is one whom the broker introduced, and that the sale was in some degree aided by his previous unsuccessful efforts, does not give him a right to commissions. *Siddals v. Bethlehem Iron Company* (N. Y.), 441.
3. **To sell goods — authority to collect pay.]** An agent to sell goods, selling on credit, has implied authority to receive pay therefor, and the purchaser is not chargeable with constructive notice to the contrary by the words "payable at office," on the bill rendered. *Putnam v. French* (Vt.), 692.

See CONTRACT, 278; NEGOTIABLE INSTRUMENT, 197.

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BAGGAGE.

See CARRIER, 617.

BAILMENT.

Loan of chattels—damage by elements.] The owner of a flag lent it to his employer, helped to hoist it on the employer's building, and left it flying when he went away. It was afterward injured by a hailstorm. *Held*, in the absence of proof of negligence, that the borrower was not liable for the injury. *Beller v. Schultz* (Mich.), 280.

BANK.

1. **Insolvent—set-off.]** A depositor in an insolvent savings bank, who also owes it for borrowed money, cannot set off his deposit against such debt, although the deposit consisted of the borrowed money. *Hannon v. Williams* (N. J.), 378.
2. **Payment of forged paper—laches of depositor.]** The plaintiffs' confidential clerk forged their checks and obtained payment on them from the defendant, their bank. The forged checks were returned by the bank to the plaintiffs, with their pass-book, when their account was balanced, but the clerk in assisting them to examine the account fraudulently prevented the discovery of the forgeries. *Held*, that the plaintiffs were not estopped from disputing the account and recovering the balance deducting the forged checks. *Frank v. Chemical National Bank* (N. Y.), 501.

BANKRUPTCY.

See JUDGMENT, 797.

BAR.

See FORMER ADJUDICATION, 774.

BILL OF EXCHANGE.

See NEGOTIABLE INSTRUMENT, 310.

BOUNDARY.

- 1 **Cliff—accretion—adverse possession—inclosure.]** Town trustees in 1786, having title to lands on a bay, bounded by ordinary high-water mark, made an allotment, bounding westerly by a cliff, between which and high-water mark was a strip of land. The defendants and their predecessors, claiming under the allotment, had fenced across this strip, to or near low-water mark, removing the fences in winter to prevent their destruction by the ice and tides, but not fencing along the cliff. They had also gathered sea-weed from the strip. In an action to recover this strip, *held*, (1) that the site of the cliff at the time of the allotment was the permanent boundary, and that the plaintiffs could not follow to the cliff, if it had become worn away by the action of the water, in order to make up for the advance of the sea; (2) that there was no necessity of fencing

CHECK — *Continued.*

seizure of corporate property; (4) that an adjudication of forfeiture by the District Court was without jurisdiction and invalid. *Bisley v. Phoenix Bank of City of New York* (N. Y.), 421.

CIVIL DAMAGE ACT.

Construction — right of action.] Under a statute which gives to "every wife, child, parent, guardian, husband or other person," a right of action, for injury by reason of the intoxication of any person, against the seller of the liquors, the intoxicated person himself has no right of action against the seller for money stolen from him when drunk. *Brooks v. Cook* (Mich.), 282.

COLLECTOR.

Of taxes.] See OFFICER, 189.

COMITY.

Action for death by negligent injury in another State.] An administrator appointed in New York may maintain an action for the death of his intestate occasioned by a negligent injury by the defendant in another State having a statute substantially like the New York statute, allowing an action of damages for death by negligence. *Leonard v. Columbia Steam Navigation Company* (N. Y.), 491.

See CONTRACT, 518.

CONFISCATION ACT.

See CHECK, 421.

CONFLICT OF LAW.

Seizure by Federal marshal on execution of third person's goods.] The owner of goods, seized by a United States marshal on execution against another person, may maintain replevin therefor in a State court. *Heyman v. Covell* (Mich.), 272.

See MARRIAGE, 528.

CONSPIRACY.

See CRIMINAL LAW, 654.

CONSTITUTIONAL LAW.

1. **Improvement of navigable streams — tolls.]** It is competent for a State legislature to authorize private parties to charge tolls for the use of improvements made by them in the channel of a navigable river within its boundaries. *Nelson v. Cheboygan Navigation Company* (Mich.), 223.
2. **Rival toll bridges across river.]** The plaintiff was incorporated to erect a toll bridge across a certain fresh-water river, and while it should keep the same passable the erection of any bridge by others within two miles

CONTRACT — *Continued.*

- were all in writing. M. made no reply to this proposal, but sent a person to the owner to whom he sold directly, at a lower price. *Held*, that M. was not entitled to any commissions. *McDonald v. Baing* (Mich.), 199.
3. To farm on shares.] The owner of a farm employed another to till and carry on his farm, and for compensation agreed to allow him one-half of all the grain raised, deducting advances and other claims. *Held*, a contract of hiring, and that the employee was not a part owner of such grain. *Porter v. Chandler* (Minn.), 298.
4. Illegal — to induce discontinuance of criminal proceedings.] No action will lie for compensation for services in endeavoring to prevent an indictment, and after its finding, in endeavoring to induce the public authorities to dismiss it. *Barron v. Tucker* (Vt.), 684.
5. Name — injunction to restrain use of assumed.] Defendant Bate was a physician in Chicago, giving special attention to venereal diseases, and advertising largely, conducting this business under the assumed name of Andrew G. Olin. Plaintiff, Henry Olin, was a physician, who subsequently settled in Chicago, giving special attention to diseases of the eye and ear, and becoming a member of the faculty of Burnett Medical College. In consideration of admission to the medical college, and assistance by plaintiff in graduating and granting him a diploma, defendant agreed to discontinue the use of the name of Olin, but failed to do so. Plaintiff filed a bill to restrain the defendant's use of the name, alleging that it injured the plaintiff's reputation. *Held*, that the bill must be dismissed. *Olin v. Bate* (Ill.), 78.
6. Place of — statutory construction — negotiable instrument — comity.] The plaintiff, a National bank of New Orleans, purchased of the M. & T. bank located there, a draft on bankers in the city of New York, to the plaintiff's order. Subsequently the M. & T. bank was put in liquidation under the laws of Louisiana, and the defendants were appointed commissioners to receive all its property. The draft being duly dishonored, the plaintiff brought this action on it in New York, and attached funds of the M. & T. bank in that State. The defendants as such commissioners claimed the attached property. *Held*, (1) that the plaintiff was a non-resident of New York, and that the cause of action arose within that State, within the meaning of the New York statute; (2) that the lien of the attachment was superior to the rights of the defendants. *Hibernia National Bank v. Lacombe* (N. Y.), 518.
7. For printing — discretion as to design.] A sign printer submitted to a customer a design for some fancy signs or show-cards, containing two sides of a shield. The customer returned it, with the word "established" written on one shield, and "1875" on the other, with some other suggestions, and a request for "something of that style," "a clean neat label," and "something to beat" a rival manufacturer's signs. The signs were executed, with the word and figures in question at the top, instead of on

CONTRACT — *Continued.*

subscription price, a warning to patrons not to sign unless they expected to pay that price, and a "rule" that "no promise made by an agent which interferes with the intent of printed contract shall be valid." The principals delivered the book, and sued for the subscription price of \$10. The defendant brought the fees, \$4.27, into court. *Held*, that the plaintiffs could not recover. *Eberts v. Selover* (Mich.), 278.

15. Substitution — novation.] A. owed B., and C. owed A. By agreement of the three, B. accepted C.'s note for A.'s debt. C. was insolvent at the time; but this was unknown to any of the parties. *Held*, that the loss fell on B. *Cadens v. Teasdale* (Vt.), 697.
 16. For supper — extras ordered by guests.] One who contracts for a supper, at a fixed price per head, is not liable for extras ordered by the guests. *Eaton v. Gay* (Mich.), 276.
 17. Wager — rescission — statute.] C. sold and delivered to H. a horse upon his written agreement to pay \$140 one day after the re-election of G. as president of the United States, but conditioned to be void if G. was not re-elected. Before election H. tendered the horse to C. and demanded back his agreement, but C. refused to receive the horse or deliver up the agreement, and H. retained the horse as bailee. G. being re-elected, C. demanded the price, and H. refusing, but being ready and willing to return the horse, C. sued for the value, under a statute prohibiting wagers and permitting such action to be brought by the loser. *Held*, that the transaction was a wager and void; that H. was at liberty to rescind by surrendering the horse; and that he was not liable under the statute unless he had subsequently converted the horse. *Harper v. Crain* (Ohio), 589.
 18. For wages — what employer thinks worth.] An agreement by a master to pay a servant what the master thinks he is worth binds the master to pay what the services are reasonably worth. *Millar v. Cuddy* (Mich.), 121.
- Of wife.] See MARRIAGE, 552.

See MUNICIPAL CORPORATION, 97, 327.

CONTRIBUTION.

See SURETY, 515.

CORPORATION.

1. Action between stockholders for dividends.] A stockholder, who alleges that his right to participate in a dividend declared by the corporation has been wrongfully denied by it, cannot maintain an action in the first instance for money had and received against another stockholder who has participated in such dividend. *Peckham v. Van Wagenen* (N. Y.), 393.
2. Power to hold stock in another corporation.] The parties were banking corporations organized under a law forbidding any bank to hold or purchase stock in any other corporation except to prevent loss upon a debt

CRIMINAL LAW — *Continued.*

3. — *res gestæ* — declarations of victim of homicide.] On a trial for murder, a witness testified that on the occasion in question the deceased, sitting in church and looking out of a window, said to witness that the defendant was outside fixing to shoot him, and deceased immediately rose and went to the door, where some one fired on and killed him. *Held*, that the declaration was admissible, as part of the *res gestæ*. *Means v. State* (Tex. Ct. App.), 640.
4. — uncorroborated accomplice.] A conviction may be had on the uncorroborated testimony of an accomplice, although the court may, in its discretion, advise the jury not to convict unless the accomplice is corroborated. *Collins v. People* (Ill.), 105.
5. — testimony of prisoner on former trial.] On a second trial for felony the prosecution may put in as affirmative evidence the testimony of the prisoner on the former trial, with a view of contradicting it, although he does not testify on the second trial. *People v. Arnold* (Mich.), 182.
6. False pretenses — "storekeeper."] One who obtains credit on the false representation of being a "storekeeper," may lawfully be convicted of false pretenses. *Higler v. People* (Mich.), 287.
7. Homicide in resisting unlawful arrest.] A marshal undertook without warrant or legal authority to arrest one of the defendants and take away his gun; he being advised by his brother, the other defendant, to resist, offered resistance; whereupon the marshal drew and fired a pistol at the first defendant; and the other defendant then shot and killed the marshal. *Held* justifiable. *Ross v. State* (Tex. Ct. App.), 643.
- 8 Indictment. — "pregnant woman" — "woman with child."] In an indictment the phrase "woman with child" is equivalent to "pregnant woman." *Eckhardt v. People* (N. Y.), 463.
9. — prosecuting witness interpreter to grand jury.] A prosecuting witness may act as interpreter of other witnesses before the grand jury. *People v. Ramirez* (Cal.), 73.
10. Insanity.] Occasional oddity or hypochondria does not amount to insanity excusing the commission of a criminal offense. Nothing short of the inability to distinguish right from wrong can do so. *Hawes v. State* (Neb.), 375.
11. Intent — selling liquor to minor.] Under a statute forbidding the selling of intoxicating spirits to minors without written consent of parents, an honest belief that the purchaser is of full age will not absolve the seller in case of mistake. *Redmond v. State* (Ark.), 24.
12. Larceny — kleptomania] Where kleptomania is set up in defense to a charge of larceny, the court should specifically charge in regard to this species of mania, and not leave the case to the jury on the general test of ability to distinguish right from wrong. *Looney v. State* (Tex. Ct. App.), 646.

CRIMINAL LAW — *Continued.*

it to be injured," etc., should be guilty of a misdemeanor. The defendant, indicted under this statute, was secretary of a benevolent incorporated institution, an asylum for children, subject to visitation of the public authorities, but of which he was the authoritative and actual head, director, and provider, and the care and custody of whose inmates was actually in him. *Held*, that he had the care and custody of the child within the meaning of the statute; that he was bound, while he retained it, and had the means, to furnish it with suitable necessities, and if he had not the means, to apply to the public authorities for aid, or surrender it to them; and that it was not essential to show any specific act of neglect on any given day, although the indictment charged it, but it was sufficient to prove a repeated series and continuous course of neglect. *Cowley v. People* (N. Y.), 464.

22. Trial — receiving evidence subject to striking out.] On a criminal trial the prosecuting officer offered in evidence a telegram, stating that he expected to prove that the prisoner knew the meaning of certain marks on it, and that if he failed, he would consent to its being struck out. It was received under objection. The prisoner was not connected with it, but his counsel did not move to strike it out, nor ask the court to instruct the jury to disregard it. *Held*, that its reception was not error. *McCarney v. People* (N. Y.), 456.

DAMAGES.

1. Exemplary — act punishable as crime.] Exemplary damages are recoverable in an action of assault and battery, although the act is also punishable as a crime. *Boetcher v. Staples* (Minn.), 295.
2. Forcible entry and detainer — injury to credit — bodily and mental pain.] In an action of forcible entry and detainer, damages are not recoverable for injury to credit, nor for bodily or mental pain. *Anderson v. Taylor* (Cal.), 52.
3. Measure of.] In an action for destroying a field of ice, the measure of damages is the value of what could have been harvested, less the expense of storing. *People's Ice Company v. Steamer Excelsior* (Mich.), 246.
4. Negligence — parent and child — statutory construction.] Under a statute allowing an action to the parent of a minor child for injury by the wrong or negligence of another, and the recovery of such damages as may be just, there can be no recovery for injuries personal to the child. *Durkee v. Central Pacific Railroad Company* (Cal.), 59.

See SEDUCTION, 768; SET-OFF, 415; TRESPASS, 703.

DECLARATIONS.

See CRIMINAL LAW, 640.

DEED.

1. Exception — reservation.] A deed contained a specific description of land conveyed, and contained this clause: "Said J. C. Roberts reserving lots

DURESS.

1. **Deed of married woman.]** A deed executed by a married woman, in consequence of her husband's threats of abandonment unless she complies, may be avoided for duress. *Kocourck v. Marak* (Tex.), 623.
2. **— Acknowledgment.]** In the absence of fraud, mistake or imposition the certificate of a wife's separate acknowledgment of a deed is conclusive, and a purchaser is not affected by such fraud, mistake or imposition, unless he had notice. *Id.*

EASEMENT.

1. **Drainage — license — prescription.]** The parties owned adjoining city lots. The defendant had a private plank drain connecting with a public sewer in another street. In consideration of seven dollars he gave plaintiff a writing stating that the money was for the right to drain through his premises; and the plaintiff built a plank drain connecting with the defendant's, and of the same size. After more than twenty years the plaintiff substituted a tile drain of greater capacity, which caused an overflow into defendant's cellar. Defendant then cut the connection and refused the plaintiff access to the premises to open and repair the drain. *Held* justifiable. *Wiseman v. Luckainger* (N. Y.), 479.
2. **Way — when applied on severance.]** Where the real estate of a deceased person is divided among his heirs by proceedings in the Probate Court, a right of way of necessity may be implied from one part to another, and where appurtenant to a part set off for dower, it does not cease with the widow's death, but passes to a grantee or purchaser. *Goodal v. Godfrey* (Vt.), 671.

ELECTION.

- Ineligibility — candidate receiving less than plurality of votes.]** Where an ineligible candidate for a public office receives a plurality of votes, the next highest candidate is not entitled to the office, if the ineligibility does not appear on the ballots. *Barnum v. Gūpin* (Minn.), 304.

ESTOPPEL.

Mistake.] See BOUNDARY, 313.

See MASTER AND SERVANT, 8.

EVIDENCE.

1. **Books of account — original entries.]** Where a tradesman's clerk makes original entries of sales on a slate, and within a reasonable time the tradesman correctly transcribes them in a book, the two comparing the transcript with the original entries, the book, on proof of these facts, is competent evidence of the sales. *Redlich v. Bauerlee* (Ill.), 87.
2. **Letters of administration.]** In an action in New York by a New York administrator for the death of the intestate caused by negligence in another State, his letters are conclusive of his right to recover. *Leonard v. Columbia Steam Navigation Co.* (N. Y.), 491

EXECUTOR AND ADMINISTRATOR.

1. **Liability on award.]** An administrator entering into an agreement with the heirs for a common-law arbitration concerning the estate is personally liable on the award. *Powers v. Douglass* (Vt.), 699.
2. **Negligence.]** In payment of three legacies of \$1,000 each, an executor delivered three \$1,000 United States interest-bearing bonds worth everywhere \$1,200 each. *Held* negligence, for which he was liable, although the bonds had been appraised at \$1,000 each, and the executor was informed by the Probate Court that he could pay them out at the appraisal valuation. *Spaulding v. Wakefield's Estate* (Vt.), 709.
3. **Power of administrator to pledge.]** An administrator is personally liable on his note for money borrowed for the estate, and cannot be decreed to appropriate the funds of the estate to its payment, although he is bankrupt. *Merchants' National Bank of St. Johnsbury v. Weeks* (Vt.), 661.

EXEMPTION.

See EXECUTION, 84, 283.

EXPERT.

See EVIDENCE, 707.

EXTORTION.

Absence of corrupt intent.] The absence of corrupt intent is no defense to an action against an officer for a statutory penalty for taking illegal fees. *Cobbey v. Burks* (Neb.), 364.

FALSE PRETENSES.

See CRIMINAL LAW, 297.

FERRY.

Negligence—infant.] The defendant ferry company landed passengers from boats upon a pontoon secured to the shore, and occupying the width of the slip except some eight or twelve inches left for play on each side. On each outer edge of the pontoon was a sill six or eight inches high, surmounted by an arched rail, three feet above the sill at the center, and supported by stanchions six feet apart. There was also a rail twenty or twenty-two inches above the sill, and parallel with it. A child, six years old, in leaving one of the boats, fell through one of the openings in this guard, and was drowned. The pontoon had been in use five or six years, and was similar to the other ferry pontoons. No similar accident had ever happened. *Held*, that the defendant was not liable. *Leftus v. Union Ferry Company of Brooklyn* (N. Y.), 533.

FIRE COMPANY.

See CONTRACT, 637.

GIFT — *Continued.*

and the remaining of the son in her house where the furniture was, until her death. *Harris v. Hopkins* (Mich.), 180.

3. **Payment**—by savings bank to administrator of depositor trustee.] Payment by a savings bank to the administrator of a depositor whose account was "in trust for C. B.," upon production of the letters of administration and the pass-book, and in the absence of any notice from the beneficiary, the production of the book, by the rule of the bank entitling the bearer to payment, is valid and effectual to discharge the bank. *Boone v. Citizens' Savings Bank* (N. Y.), 498.

GUARANTY.

Construction of—continuing—release.] A wife assigned to a principal creditor of her largely insolvent husband a certificate of her stock in a corporation, "as a security for the payment of any demands" the creditors "may from time to time have or hold against" the husband. *Held*, that this covered demands subsequently arising as well as contemporaneous demands, and was not discharged by an extension of time of payment by the creditor by the renewal of notes in the ordinary course of business. *Merchants' National Bank of Whitehall v. Hall* (N. Y.) 434.

Oral.] See NEGOTIABLE INSTRUMENT, 145.

HIGHWAY.

Nuisance.] A platform in an alley at the rear of a store is not a nuisance in itself. *Bagley v. People* (Mich.), 192.

HACKMAN.

See MUNICIPAL CORPORATION, 296.

HOMICIDE.

See CRIMINAL LAW, 693.

HUSBAND

See SHIP AND SHIPPING, 167.

HUSBAND AND WIFE.

See FRAUD, 385 ; MARRIAGE.

ICE.

See WATER AND WATER-COURSE, 246.

INDICTMENT.

See CRIMINAL LAW, 463.

INFANCY.

See JURISDICTION, 13 ; NEGLIGENCE, 67.

INSURANCE — *Continued.*

enjoined during the sixty days from issuing any policies. *Universal Life Insurance Company v. Whitehead* (Miss.), 822.

8. Evidence — declarations of insured as against beneficiary.] On application of husband and wife the husband's life was insured for the wife's benefit. In the application the insured stated that he had had no disease or sickness in the last seven years. The policy was conditioned to be void if the statements in the application were not in all respects true. In an action by the wife on the policy, *held*, that declarations by the insured prior to the application, to the effect that he had been cured of a cancer about a year before, was incompetent. *Union Center Life Insurance Company v. Cheever* (Ohio), 573.
9. Father for children — surrender by father.] A man procured a policy of insurance on his life, payable to his wife, if living, otherwise to his children, or their guardian. The wife died leaving children. The insured had then paid all the premiums ever required by the policy. Afterward he remarried and had another child, surrendered the policy, and took a paid-up policy for the benefit of the second wife. *Held*, invalid as against his children, and that all the children by both marriages were entitled to share. *Ricker v. Charter Oak Life Insurance Company* (Minn.), 299.
10. Wife's right as assignee of, on husband's life — statutory construction.] Under a statute permitting a wife to insure her husband's life for her benefit and hold the proceeds as against his creditors, less premiums, with interest, paid by him within the statutory period of limitation with intent to defraud creditors, she may in like manner hold the proceeds of a policy which the husband has procured on his own life and assigned to her, when insolvent. *Cole v. Marple* (Ill.), 83.
11. Warranty of temperate habits.] A warranty in an application for life insurance that the applicant has never been intemperate and is of correct and temperate habits, is not broken by occasional excessive indulgence, but a continuous and daily use of intoxicating drinks is not necessary to constitute intemperate habits. *Union Mutual Life Insurance Company v. Reif* (Ohio), 618.

INTENT.

See CRIMINAL LAW, 24, 460; EXTORTION, 364.

INTERPRETER.

Prosecuting witness as, before grand jury.] *See* CRIMINAL LAW, 73.

INTOXICATING LIQUOR.

See CRIMINAL LAW, 344, 641; STATUTE, 23.

JUDGMENT.

1. Foreign — merger.] A foreign judgment does not merge the cause of action, but an action may be maintained on the same cause in another State. *Eastern Townships Bank v. Beebe* (Vt.), 665.

JUDGMENT — *Continued.*

2. *Jurisdiction — collateral impeachment.*] A judgment of a domestic court of general jurisdiction, reciting an appearance by minor defendants, a adjudication that they were minors, the appointment of a guardian *ad litem*, and his appearance and defense for them, but not showing any personal service of citation, cannot be collaterally attacked for want of such service and for fraud. *McAnear v. Epperson* (Tex.), 635.
3. *Of another State — discharge in bankruptcy.*] To a suit in Georgia on judgment rendered in Tennessee the defendant pleaded his discharge in bankruptcy. The adjudication of bankruptcy was made pending the suit in Tennessee, but the defendant did not there plead it nor stay the proceedings, and his discharge was granted after the judgment. *Held*, valid plea. *Anderson v. Anderson* (Ga.), 797.

See FORMER ADJUDICATION, 774 ; MORTGAGE, 129.

JURISDICTION.

Infants' real estate — power of court to sell.] The Court of Chancery has inherent power to decree a sale of an infant's real estate. *Goodman v. Welter* (Ala.), 18.

See CRIMINAL LAW, 659 ; JUDGMENT, 635.

JUROR.

Action against grand.] *See* ACTION, 48.

JURY.

Officer in room during deliberations.] The officer in charge of a jury in capital case was permitted by the court to remain in the room during the deliberations. *Held* no error. *Crockett v. State* (Wis.), 783.

KLEPTOMANIA.

See CRIMINAL LAW, 646.

LACHES.

See BANK, 501 ; DOWER, 6.

LANDLORD AND TENANT.

Rent paid to one not having title — action for.] One who has paid rent in land claimed by the lessor, and has peaceably and undisturbedly enjoyed the full term, cannot recover the rent from the lessor, although the lease has been ejected or has voluntarily surrendered to a superior title. *Dowell v. Brown* (Ga.), 792.

LARCENY.

See CRIMINAL LAW, 646.

LICENSE.

See EASEMENT, 479.

LIMITATION.

1. Statute of — payment procured by surety out of principal's funds.] Where a surety procured a compulsory payment out of the funds of the principal and promised to pay the balance of the debt, *held*, sufficient to arrest the running of the Statute of Limitations. *McConnell v. Merrill* (Vt.), 663.
2. — promise, when sufficient to revive debt.] Nothing short of an unqualified written promise to pay will revive a debt against which the Statute of Limitations has run. *Pierce v. Seymour* (Wis.), 737.

See ADMINISTRATOR, 15.

LOAN.

See BAILMENT, 280.

MARRIAGE.

1. Conflict of law — wife's right to dividends of foreign corporations, paid to husband.] A husband and his wife lived in Maryland. The wife owned stock in a Virginia bank. The husband was a cashier, stockholder, and manager of two Maryland banks, with which the Virginia bank kept accounts in his name as cashier. Dividends declared by the Virginia bank on the wife's stock were paid to the Maryland banks, or credited in such accounts, and allowed on settlement. The common-law rule, as to the relation of husband and wife, prevails in Virginia. *Held*, that a finding of payment of the dividends to the husband was warranted, and that such payment discharged the defendant from liability to the wife or her assignee. *Graham v. First National Bank of Norfolk* (N. Y.), 528.
2. Contract of married women for loan secured by mortgage on her estate — public policy.] To effect a loan to remove a mortgage from her separate real estate, a married woman agreed in writing to execute a warranty deed thereof in fee and to accept a lease for ten years, with privilege of redemption at the end of the term, and agreed to pay a ground rent equal to eight per cent per annum on the amount loaned, and all taxes and assessments during the term. The purpose of the lender was to evade taxation as upon the mortgage. The married woman also agreed to pay an attorney for his services in procuring the loan in that form. *Held*, (1) that the security was taxable as an equitable mortgage; (2) that the agreement to pay for the services was not contrary to public policy; (3) that the agreement was binding as for the benefit of the separate estate. *Patrick v. Littell* (Ohio), 552.
3. Coverture — specific performance.] Where two, one of whom is a married woman, covenant to convey real estate which they jointly own, the purchaser cannot set up the coverture in avoidance of his covenant to purchase, when the other party is competent and willing and offers to perform. *Richards v. Doyle* (Ohio), 550.
4. Divorce — agreement of separation.] In an action by a wife for divorce for cruelty, an agreement of separation made two years before, after the

INDEX.

MARRIAGE — *Continued.*

- acts of cruelty, and after actual separation, and substantially co with by the husband, is a valid defense. *Squires v. Squires* (Vt.), 6.
6. — evidence — testimony of young children of parties.] A will not be granted upon the testimony of young children of the *Crowner v. Crowner* (Mich.), 245.
6. — fraudulent concealment of woman's previous unchastity marriage cannot be avoided by reason of the concealment of woman, before the marriage, of her unchastity, nor of her fraudulent representation that she was chaste. *Varney v. Varney* (Wis.), 726.
7. Dower — desertion without adultery.] A wife's right of dower defeated by her desertion of her husband without adultery. *Wiser Wiseman* (Ind.), 115.
8. Married woman's sale of business and good-will and covenant to carry on business.] A married woman selling her separate stock and linary goods and the good-will of the business may bind herself to engagement not to carry on that business at that place or within a distance as would interfere with it. *Morgan v. Perhamus* (Ohio), 9.
9. Mortgage by wife to secure husband's note.] A wife executed a mortgage on her separate property to secure her husband's note, before note was due, without any agreement to extend the time of its payment or other new consideration. *Held* not enforceable. *Kansas Manufacturing Company v. Gandy* (Neb.), 370.
10. Wife's right to compensation for services in family.] A wife may recover for services in taking care of her blind and aged father-in-law, residing in her husband's family, in pursuance of an arrangement or understanding to that effect with the father-in-law, fairly made, and assented to by the husband. *Mason v. Dunbar* (Mich.), 201.

Action for promise of, by married man.] See FRAUD, 702.

Insurance of husband's life for benefit of wife.] See INSURANCE, 83.

MARRIED WOMAN.

See DURESS, 623 ; MARRIAGE.

MASTER AND SERVANT.

1. Breach of contract for employment — duty to accept employment by others.] In actions by a father for wages on a contract for employment of his minor son for a certain term, the son having been prematurely dismissed, the father may recover for every installment as it falls due, if he is not bound to accept employment for his son by others, unless in the same or a similar employment, in the same place, and by persons of objectionable capacity, reputation, habits, morals, and mode of conducting ; and the burden of showing such an opportunity is on the defendant. *Strauss v. Meertief* (Ala.), 8.

2. **Cause assigned for dismissal.]** The employer is not estopped by the cause which he assigns for dismissal of his servant. *Id.*
3. **Negligence — co-servant.]** A master is not liable to one servant for injuries from the negligence of another servant in the same common employment, although the negligent servant is superior in authority or overseer of the one injured. *Brown v. Winona & St. Peter Railroad Company* (Minn.), 285.
4. **Negligence — known violation of master's rules by co-servant.]** An employee of a railroad company was injured by one of its locomotive engines, owing to the negligence or incompetency of the fireman, who against the rules of the company had been temporarily left in charge of the engine by the engineer. The master mechanic of the company, whose duty it was to employ and discharge the engineers and firemen, knew that the engineers generally were in the habit of so leaving their engines. Held, that the company was liable for the injury. *Ohio and Mississippi Railway Company v. Collarn* (Ind.), 184.
5. **Work for others out of business hours.]** In an action for services, it is no defense that the services were rendered while the claimant was an employee of a third person in another line of business, and both during and out of the business hours of such third person. *Wallace v. De Young* (Ill.), 108.

Contract for wages.] See CONTRACT, 181.

MERCANTILE AGENCY.

See FRAUD, 389.

MEMORANDUM.

See STATUTE OF FRAUDS, 723.

MERGER.

See JUDGMENT, 665; MORTGAGE, 129.

MISTAKE.

Of facts.] One cannot recover money paid by him, after investigation, upon a claim set up in good faith, but which turns out to be unfounded. *McArthur v. Luce* (Mich.), 204.

In registration.] See DEED, 235.

See ADVERSE POSSESSION, 178; BOUNDARY, 313.

MORTGAGE.

1. **By railroad — after-acquired property — hotel.]** A railroad company mortgaged all its "real and personal estate and franchises now owned or hereafter to be acquired." Subsequently the company bought a hotel, a store-house, some vacant town lots, and a farm of three hundred acres. This property

MUNICIPAL CORPORATION — *Continued.*

7. — **defect in highway.]** A city is not liable for an injury to an individual by neglect to keep its streets in repair. *Id.*
8. **Ordinance — fire limits — nuisance.]** A city ordinance, in pursuance of the charter authority, establishing fire limits, and declaring wooden roofs thereafter erected within such limits to be a nuisance, and requiring the marshal, under the mayor's order, summarily to remove them, is reasonable and valid. *King v. Davenport* (Ill.), 89.
9. — **hackmen.]** A city ordinance putting hackmen at railway stations under the commands of the police there, and enacting that they shall take positions there assigned them by the police, is warranted by a charter authority to regulate hacks, and is reasonable, although the places in question are not the property of the city. *City of St. Paul v. Smith* (Minn.), 296.
10. — **suspension.]** The plaintiff was gored by a cow running at large in a city street. The city council had passed an ordinance forbidding cattle running at large in the streets, but subsequently suspended it, and the injury occurred during the suspension. *Held*, that there was no cause of action against the city. *Rivers v. City Council of Augusta* (Ga.), 787.
11. **Tort by police officer.]** A city is not liable for a wrong committed by one of its police officers wantonly and not in the discharge of his duty. *McElroy v. City Council of Albany* (Ga.), 791.

NEGLIGENCE.

1. **Concurrent — remedy.]** When a railway passenger sustains a personal injury by the directly concurrent negligence of the railway company and another, he may maintain an action therefor against the latter in spite of the concurrent negligence of the former. *Transfer Company v. Kelly* (Ohio), 558.
2. **Contributory — sparks from a locomotive.]** The plaintiffs owned a warehouse, with a branch track connecting with defendant's railway, and employed defendants to draw cars upon that track for their accommodation. The engine thus used emitted sparks; the plaintiffs complained of this to defendants; the defendants promised to repair it, but neglected to do so; and the plaintiffs continued to employ the engine. The warehouse being set on fire by sparks from this engine, *held*, that the plaintiffs had no remedy therefor against defendants. *Marquette, Houghton & Ontonagon Railroad Company v. Spear* (Mich.), 242.
3. — **sudden peril.]** A railway passenger is not guilty of negligence in attempting to leave a car, under a reasonable belief that by so doing he will escape injury from an impending accident, where he is injured by the company's negligence in so doing, although he would have escaped had he remained. *Iron Railway Company v. Mowery* (Ohio), 597.
4. **Infant trespasser on railway track.]** An infant, six or seven years old,

and a subsequent telegram, on being informed of the price, "will advance cost if you buy strict good ordinary at sixteen," constitute "an unconditional promise in writing to accept a bill before it is drawn," and under a statute "amount to actual acceptance;" and presentment for acceptance or payment is not necessary. *Whilden v. Merchants and Planters' National Bank* (Ala.), 1.

2. Agent, signing by — personal liability — bona fide holding.] A note for a church debt to A. B., and payable to the order of "A. B., cashier," was signed by him and several others, with the addition of "vestrymen, Grace church," to their respective names. *Held*, the note of the signers, individually, and not of the church, and that the bank of which A. B. was cashier could not acquire it as bona fide holder. *Tilden v. Bernard* (Mich.), 197.
3. Bill of exchange — equitable assignment.] A bill of exchange, payable generally, is not an equitable assignment of funds in the drawee's hands; and although the drawee owes the drawer more than the amount of the bill, and refuses to accept or pay the bill, and afterward pays the funds to the drawer, he is not liable to the payee. *Bush v. Foote* (Miss.), 310.
4. Fraud in procuring — negligence of maker.] Where one signs a negotiable note relying on the fraudulent representations of the payee that it is something different from a note, and makes no effort to ascertain its tenor, whether he can read or not, he is liable thereon to a bona fide holder for value. *Ruddell v. Dillman* (Ind.), 152.
5. Note intended to be sealed — omission of seal.] A promissory note concluded, "witness my hand and seal," etc., but no seal was affixed. *Held*, that it must be treated as a sealed instrument. *McCarley v. Board of Supervisors* (Miss.), 338.
6. Oral guaranty of.] An oral guaranty of the genuineness of a note and the liability of the maker to pay it, made by the holder upon a transfer of it for value, is valid. *King v. Summitt* (Ind.), 145.
7. Place of payment ambiguous — demand.] A note was dated at one place, made payable "at ———," and had the name of another place appended to the maker's signature. *Held*, that demand at the banks at the place of date, with the fact that the defendant did not live or do business there, was insufficient to charge the indorser, in the absence of proof that the maker had absconded or that inquiry had been made for him at the other place. *Nicholson v. Barnes* (Neb.), 373.
8. Principal and surety — forgery of principal's name.] When the name of one maker of a joint note has been forged, another maker, although only a surety and signing in the belief that the forged name is genuine, is nevertheless bound to an innocent payee. *Helms v. Wayne Agricultural Company* (Ind.), 147.
9. Transfer by indorsement — evidence — diversion.] A note payable to the order of "myself," signed by two, and placed by one in the hands of

NOTE—*Continued.*

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OFFICE AND OFFICER.

Tax collector—liability for false returns.] A tax collector is liable for a false return of *nulla bona*, whereby the owner of a mortgage of lands is compelled to redeem from a tax sale. *Raynsford v. Phelps* (Mich.), 189.

Execution of instrument by public.] *See* AGENCY, 39.

Statute relieving public officer from liability.] *See* CONSTITUTIONAL LAW, 582.

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PARENT AND CHILD.

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PARTNERSHIP.

1. **Power of partner to bind, by sealed note.]** One partner may bind the partnership by a sealed note, executed in the firm name, for a loan of

Duty toward trespassers.] See NEGLIGENCE, 632.

See MORTGAGE, 343.

RAPE.

See CRIMINAL LAW, 366.

REAL PROPERTY.

Structure for dancing.] A wooden structure, built and used for dancing, of light materials, resting partly on the ground and partly on posts set in the ground, and roofed with brush, with a door opening into the owner's adjacent dwelling and saloon, with seats for musicians, between the two buildings on cross pieces fastened to both, is real estate. *Lipsky v. Borgmann* (Wis.), 735.

REGISTRATION.

See DEED, 235.

RESERVATION.

See DEED, 710.

RES GESTÆ.

See CRIMINAL LAW, 640.

RESTRAINT OF TRADE.

See CONTRACT, 781.

REWARD.

No intent to claim.] One cannot recover a reward where his acts were performed with knowledge of the offer of a reward, but without any intention of claiming it. *Hewitt v. Anderson* (Cal.), 65.

RIVER.

See STATUTE, 599.

ROBBERY.

See CRIMINAL LAW, 460.

SALE.

Accounts—implied warranty.] On the sale of accounts there is an implied warranty that they are genuine and owing. *Gilchrist v. Hilliard* (Vt.), 703.

See STATUTE OF FRAUDS, 544.

SEDUCTION.

Loss of service—damages—evidence—force.] A father may maintain an action for the seduction of his minor daughter while in the defendant's service if he retained the right to receive her services. Exemplary dam-

with sleeping with another man than her husband, and the proof is that he charged that such a person was in bed with her, *held*, no variance. *Id.*

2. Sodomv.] A false charge of sodomy is not slanderous in itself. *Melvin v. Weiant* (Ohio), 572.

SOCIETY.

Expulsion—notice.] The by-laws of a voluntary association provided for striking from the roll members in arrears for dues, after notification and neglect to pay; and for fines for omissions of members to give notice of change of residence. On joining, the plaintiff's intestate gave notice of his residence, but subsequently changed his residence without giving notice. He was struck from the rolls for failure to pay dues, without notice to him. *Held*, that the plaintiff was nevertheless entitled to recover the amount made payable on the intestate's death by the by-laws. *Wachtel v. Noah Widows and Orphans' Society* (N. Y.), 478.

See ACTION, 270.

SODOMY.

See SLANDER, 572.

SPECIFIC PERFORMANCE.

See MARRIAGE, 550.

SPIRITUALISM.

See WILL, 756.

STATUTE.

1. **Druggist selling ardent spirits without license on prescription.]** Under a statute forbidding the sale of ardent spirits by any person for any purpose without a license, a druggist cannot lawfully sell such spirits, even as medicine upon the prescription of a physician. *Woods v. State* (Ark.), 22.
2. **Fictitious names in firms — “& Co.” representing wife.]** A statute prohibiting the use of names in firms of persons not interested, and requiring that “& Co.” shall represent an actual partner, does not apply to a case where those words represented the wife of the person whose full name appears. *Zimmerman v. Erhard* (N. Y.), 396.
3. **“Merchants” — “peddler” — “drummers.”]** A commercial traveller or “drummer” is not a “merchant” or “peddler,” or “of like character.” *Ex parte Taylor* (Miss.), 336.
4. **Playing cards for mere amusement.]** A statute forbidding “any game of cards, dice, or other gaming device” at any tavern or dram-shop, does not include the playing of cards without any bet or stake depending thereon. *Ansley v. State* (Ark.), 29.
5. **Public charity — hospital.]** A hospital, with the necessary grounds, free to all who are not pecuniarily able, and supported partly by private con-

INDEX.

STATUTE — *Continued.*

tributions and partly by fees from patients, but producing no profit purely "public charity." *County of Hennepin v. Brotherhood of seamen* (Minn.), 298.

3. **Killing game on lands — navigable river.]** A statute imposed a penalty for killing certain birds on inclosed and improved lands, or any whose boundaries "are defined by stakes, posts, water-courses, ditch marked trees," and whose owner has given verbal or written notice hunt thereon; or on lands on which a board is conspicuously set up notice that no shooting or hunting is allowed on such premises. *Held*, apply to the channel of a navigable river, the land-owner having posted the statutory notice on the shore. *State v. Shannon* (Ohio), 599.

See CIVIL DAMAGE ACT, 282; CONTRACT, 518, 589; CRIMINAL LAW 641, 649; DAMAGES, 59; TELEGRAPH COMPANY, 583.

STATUTE OF FRAUDS.

1. **Debt of another.]** A stockholder and president of a corporation promised M. that if he would subscribe and pay \$500 to the capital he should receive fifteen per cent on that amount in a year. *Held*, contract to answer for the debt, default, or miscarriage of another. *Moorehouse v. Crangle* (Ohio), 504.
2. **Memorandum — sale of lands at auction.]** The agent of the vendor real estate sold at auction cannot bind the purchaser by a memorandum thereof made and signed by him for the vendor alone, after the sale by the auctioneer, and not in any way assented to by the purchaser. *See* *Boyer v. Savage* (Wis.), 723.
3. **—.]** An oral promise to pay the debt of a minor is not within the statute of frauds. *King v. Summitt* (Ind.), 145.
4. **Sale of goods — payment — time of.]** Parties made an oral contract for the sale of goods, void under the statute of frauds. Subsequently the purchaser gave and the seller accepted a check for a part of the price at that time the essential terms of the original contract were restated. The check was good when delivered, and was duly paid. *Held*, a payment at "at the time" of the contract. *Hunter v. Watson* (N. Y.), 544.

STOCK.

See CONTRACT, 398; CORPORATION, 330.

STOCKHOLDERS.

Action between.] *See* CORPORATION, 392.

SUBROGATION.

See SURETY, 659.

SUBSCRIPTION.

See CONTRACT, 278; SUNDAY, 159.

1. "Business."] Procuring signatures of tax payers to a petition to a board of supervisors to issue railroad aid bonds, is "business," and if done on Sunday confers no authority to issue the bonds. *De Forth v. Wisconsin & Minnesota Railroad Company* (Wis.), 737.
2. Note executed on — ratification.] The execution of a note by an accommodation surety on Sunday is void, although the note is dated on a week-day, and is delivered by the principal to an innocent payee on a week day; and a request by the surety to forbear suit, and his notifying the payee of property of the principal to which he might resort, do not amount to a ratification. *Parker v. Pitts* (Ind.), 155.
3. Subscription on, for building church.] A subscription may lawfully be made on Sunday for the erection of a house of religious worship. *Allen v. Duffie* (Mich.), 159.

SURETY.

1. Death of co-surety — liability of estate to contribute.] The estate of a deceased co-surety is liable to contribute in a suit by a co-surety. *Johnson v. Harvey* (N. Y.), 515.
2. Indulgence to principal — release of debtor from prison.] A receiver was imprisoned for not paying over money in obedience to an order of the court. He was released with the assent of the party to whom he was ordered to pay the money. *Held*, that this did not discharge the surety, although he was able to pay when in prison, and afterward became insolvent. *Hawkins v. Mims* (Ark.), 90.
3. Security to, available to creditor.] An infant's guardian executed a mortgage as security to a surety on his bond. *Held*, that the infant was entitled to the benefit of it as security for what was due from the guardian. *Morrill v. Morrill* (Vt.), 661.

See NEGOTIABLE INSTRUMENT, 147.

TAXATION.

Foreign stock—constitutionality.] Stock in a foreign corporation may lawfully be taxed to the resident owner, although the capital of such corporation is taxed where it is located. *Bradley v. Bauder* (Ohio), 547.

See PAYMENT, 745.

TELEGRAPH.

See NEGOTIABLE INSTRUMENT, 1.

TELEGRAPH COMPANY.

1. Condition — negligence — repeated messages.] A telegraph company may lawfully restrict its liability for errors in dispatches beyond the amount paid for transmission, to cases where the dispatches are repeated and paid for as such; and under such a regulation, an error in a dispatch

See SLANDER, 561.

WAGER.

See CONTRACT, 398, 589.

WARRANTY.

Implied, of accounts.] *See SALE, 706.*

See ACTION, 240; INSURANCE, 618.

WATER AND WATER-COURSE.

1. **Right of riparian owner in ice.]** The plaintiffs, engaged in the ice business at Detroit and lessees of a large portion of the water front of Belle Isle, in the Detroit river, constructed a boom along the same fifteen feet from the shore. The defendant's ferry boat was run up and down the river so near the boom that the swell broke up and destroyed the ice formed inside the boom in the winter, and the weather becoming and continuing warm, new ice did not form. There was room for the passage of the boat at a safe distance from the boom. *Held*, that the defendant's boat was liable for damage to the plaintiffs' business. *People's Ice Company v. Steamer Excelsior* (Mich.), 248.
2. **Riparian rights diversion for supplying locomotives.]** An upper riparian owner on a stream has no right to divert the water, by pipes and reservoirs, for the use of his locomotive engines, to the detriment of a lower proprietor, a mill owner; and such conduct may be enjoined. *Garwood v. N. Y. Central and Hudson River Railroad Company* (N. Y.), 452.
3. **Surface-water obstructing artificial ditch.]** A railway company, in the construction of its road, is not liable in damages for filling up an artificial ditch by which surface-water was drained from lands of an adjacent owner into a river. *O'Conner v. Fond Du Lac, Amboy & Peoria Railway Co.* (Wis.), 754.
4. **— obstruction of.]** A railroad company, having acquired a right of way, and found it necessary to raise its track above the natural surface of the land, is not bound to provide culverts or other means for the passage through the embankment of surface-water or water overflowing from a river and descending in that direction from or over the lands of the adjoining owner. *Cairo and Vincennes Railroad Company v. Stevens* (Ind.), 189.

See CONSTITUTIONAL LAW, 222, 407, 569; MUNICIPAL CORPORATION, 743.

WAY.

See EASEMENT, 671.

WILL.

1. **Absolute devise — limitation.]** Lands being devised to the testator's sons, subject to the right of the testator's widow to one-third of the rents and

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